Unprecedented: Informal Rules and Leader Power in the United States Senate

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Abstract

This paper examines the role played by Senate precedents in the context of the emergence of centralized party leadership in the institution over the past three decades. Specifically, it analyzes the development of precedents governing the amendment process alongside efforts by party leaders to exert control over the Senate floor. The precedents stipulating how many amendments may be pending to legislation at a given time evolved in order to facilitate the consideration of the Senate's business in an orderly manner. However, both Democratic and Republican party leaders utilize these same precedents today to block the consideration of unwanted amendments on the Senate floor. Juxtaposing the reasons behind the creation of these precedents with their current use provides a unique perspective on the centralization of power in the office of the majority leader and the institutional development of the Senate more broadly. Accounting for the continued adherence of senators to the precedential restrictions governing the amendment process today also draws our focus to the consequences of such change for the contemporary Senate and offers some clues as to the future course of its development if current practices continue.

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* Prepared for presentation at the Congress and History Conference, Carl Albert Center, University of Oklahoma, June 16-17, 2016. The author would like to thank Elizabeth Rybicki for her assistance with this ongoing project.

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Lamar Alexander (R-Tennessee) took to the floor of the United States Senate during a rare Sunday session in late July of 2015 to speak against a perhaps equally rare procedural maneuver being utilized by one of his Republican colleagues to force a vote in relation to an amendment. Senator Ted Cruz (R-Texas) had tried unsuccessfully two days before to offer the amendment to the Hire More Heroes Act (HR 22). He was unable to do so because the majority leader, Mitch McConnell (R-Kentucky), had previously filled the amendment tree on HR 22 by offering several measures to the bill that would reauthorize the highway bill, revive the Export-Import Bank (Ex-Im), and repeal ObamaCare. McConnell then filed cloture on the underlying bill and each of the amendments.

Despite the fact that the majority leader's actions technically prevented Cruz from offering his amendment, he chose to call it up anyway and asked for its immediate consideration. In short, he offered a so-called third degree amendment.[1] Predictably, the Chair ruled the Cruz amendment out of order, stating:

> The amendment is not in order to be offered, as it is inconsistent with the Senate's precedents with respect to the offering of amendments, their number, degree and kind.[2]

Cruz subsequently appealed the ruling of the Chair. The Senate's adjudication of the appeal was scheduled to take place the following Sunday immediately after cloture was invoked on the first pending amendment to get the sixty votes necessary to end debate. The question to overturn the ruling of the Chair would be a simple-majority vote.

That Sunday, McConnell opened the Senate with remarks that appeared to speak to the frustration rank-and-file members felt due to the lack of amendment opportunities on the pending

[1] Third degree amendments are defined broadly here as any amendment that is not allowed to be offered under the Senate's precedents when the amendment tree has been filled.

[2] July 24, 2015, 114-1, *Record*, p. S5675.

legislation. He tried to reassure them that the amendment process would be opened once the ObamaCare and Ex-Im amendments were disposed of. "The slots for these amendments will be open once the Senate disposes of them and that will open the possibility of considering other important amendments."[3] Yet this was unlikely absent unanimous consent. For one, the cloture process had already begun, leaving very little time to reach an agreement on considering additional amendments. Moreover, any amendments considered from that point on would have to be germane to the underlying bill or one of the pending amendments (absent unanimous consent) due to the restrictions imposed by invoking cloture on a measure.

Alexander, a three-term senator, close McConnell ally, and widely recognized expert on the Senate's rules, had come to the Senate floor shortly after the majority leader had finished speaking to warn his colleagues of the dire consequences that would result if they joined Cruz in voting to overturn the decision of the Chair later that morning. Specifically, he made two claims regarding Cruz's effort.

First, Alexander equated Cruz's appeal with the nuclear option employed by Senate Democrats in November 2013.[4] He suggested, "If…a majority of Senators agree with the Senator from Texas, the Senate will be saying that a majority can routinely change Senate rules and procedures anytime it wants on any subject it wants in order to get the result it wants."[5] Alexander's goal was to link Cruz's appeal with the effort of Senate Democrats to circumvent the filibuster for judicial and executive nominations on a simple-majority vote in the previous Congress; a move that had been widely criticized by Senate Republicans ever since. Doing so would make it less likely that Republican senators would vote to overturn the Chair, regardless

[3] July 26, 2015, 114-1, *Record*, p. S5702.

[4] The nuclear option is defined here as ignoring, circumventing, or changing the Standing Rules of the Senate with a simple-majority vote in direct violation of those rules. It is distinguished from a reform-by-ruling approach by its narrow focus on the use precedent to overturn a Standing Rule.

[5] July 26, 2015, 114-1, *Record*, p. S5706

of how they felt about the substance of the underlying amendments. He intimated this point in his closing remarks, observing "a Senate in which a majority routinely changes the rules by overruling the Chair is a Senate without any rules."[6]

Second, Alexander asserted that Cruz's appeal would, if successful, "destroy a crucial part of what we call the rule of regular order in the U.S. Senate."[7] The consequence would be the creation of "a precedent that destroys the orderly consideration of amendments."[8] As such, he confidently predicted, "There will be unlimited amendments. There will be chaos."[9] This would be particularly concerning to members accustomed to being in Washington Tuesday-Thursday when the Senate was in session.

The majority whip, John Cornyn (R-Texas), echoed Alexander's description of the consequences that would befall the Senate should Cruz be successful in his effort. "If the rule the junior Senator from Texas is arguing for is embraced, we will lose all control of the Senate schedule; there will be chaos; and, indeed, we won't be able to meet simple deadlines."[10] Cornyn concluded by observing, "To overrule the Chair on something this important to the orderly consideration of the Senate's business would be a terrible mistake."[11]

Not to let such characterizations go unanswered, Cruz responded by pointing out where he believed these statements to be inaccurate and inconsistent. For example, Cruz argued in reply to Alexander that his effort was very different from the nuclear option even though both utilized the same mechanism to accomplish their goals (i.e. an appeal of the Chair's ruling).

> The senior Senator from Tennessee gave a learned speech on changing the rules of this body through appealing the ruling of the Chair, and I very much agree.

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[6] July 26, 2015, 114-1, *Record*, p. S5706.
[7] *Ibid*.
[8] *Ibid*.
[9] *Ibid*.
[10] *Ibid*., S5708.
[11] *Ibid*.

> When the former majority leader used the nuclear option, it was wrong to violate the rules. But the amendment tree does not come from the rules, the amendment tree comes from the precedents, and precedents are set precisely through appealing the rulings of the Chair by a majority vote.[12]

He also pointed out that many of his colleagues, including Alexander, McConnell, and Cornyn, had voted on several occasions in the past to overturn rulings of the Chair.[13]

Cruz then asserted that the practice of filling the amendment tree was inconsistent with the Senate's institutional character and urged his colleagues to vote to overturn the ruling of the Chair in order to allow his amendment to be made pending to the bill.

> A great many Members of this body have given long, eloquent speeches on how this body operates when each Member has a right to offer amendments- and even difficult amendments. We debate and resolve them. That is the heart of this vote, and I would encourage each Member here to vote his conscience or her conscience on both substance and the ability of the Senate to remain the world's greatest deliberative body.[14]

The implication was that the centralization of power in the office of the majority leader, represented here by the filling of the amendment tree, was inherently destructive of the Senate's deliberative nature.

This exchange begs the question: Would overturning the ruling of the Chair be a "terrible mistake" because doing so would give rise to "unlimited amendments," "chaos;" or "a Senate without any rules" as Alexander claimed? Or would it, as Cruz claimed, represent a legitimate,

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[12] July 26, 2015, 114-1, *Record*, p. S5708.

[13] It can be inferred from the past voting behavior of Republican senators currently serving at the time in the 114th Congress that appealing the ruling of the Chair, in itself, is not perceived to be synonymous with the nuclear option as used by Senate Democrats in November 2013. For example, during the period between 1987 and 2014, forty-two Republicans currently serving in the 114th Congress voted to overturn the Chair's ruling (or against a motion to table an appeal of the Chair's ruling) at least two ties. The point of order was raised in a non-debatable posture in both cases. Of these, thirty-seven members voted to overturn the Chair's ruling (or against a tabling motion) three or more times. Seven members currently serving voted against the Chair nine or more times, four did so ten or more times, and two voted to overturn the Chair (or against a motion to table an appeal) fourteen times. There are 14 freshmen senators in the Republican Conference in the 114th Congress who have not yet had an opportunity to vote for, or against, appealing the ruling of the Chair. Alexander has voted to overturn the ruling of the Chair (or against a tabling motion) four times. Cornyn and McConnell have done so five and fourteen times, respectively.

[14] July 26, 2015, 114-1, *Record*, p. S5708.

albeit increasingly rare, act of expanding the number of amendments allowed to be pending to legislation at the same time in order to better reflect the needs of rank-and-file senators? The following examination provides an initial answer to this question. It does so by considering the ways in which the Senate considers amendments in a historical context. Specifically, my analysis focuses on the timing and sequence of changes in the amendment process and their impact on the number of amendments simultaneously permitted on legislation. Such an approach allows us to evaluate the two competing claims above. It also draws our focus to the different implications each poses for the future course of the Senate's institutional development.

Adopting a historical approach to understanding the amendment process in the contemporary Senate has an added benefit in that it helps us develop an explanation for the puzzle presented by the fact that majority leaders have recently been able to exercise significant influence over Senate decision-making in the absence of formal rules that bestow the power on them to do so (a la the Speaker of the House of Representatives). In short, it helps us better understand the mechanics of filling the amendment tree. This improves our ability to explain for why individual senators, and Senate minorities more broadly, have not challenged the majority leader's ability to do so despite the fact that its use is more frequent today.

Recent work has focused on the ways in which Senate majorities successfully block the consideration of unwanted minority proposals on the Senate floor and to track their use in the face of the super-majoritarian constraints of the institution (e.g. Beth et al. 2009; Den Hartog and Monroe 2011; Koger 2010; Sinclair 2007; Smith 2014). This work underscores the significance of the majority leader's ability to use his priority of recognition to fill the amendment tree. When coupled with cloture and employed early in the consideration of legislation on the Senate floor, filling the tree may be successful in passing the majority's preferred bill through the Senate

unchanged. At a minimum, the tactic protects members of the majority from having to cast tough votes that could be used against them in their effort to secure reelection. In this sense, filling the amendment tree plays an important role in Senate decision-making regardless of whether or not Senate parties are viewed as policy or electoral coalitions (e.g. Roberts and Smith 2007).

Yet despite these important contributions, we have, at best, only a limited understanding of how the majority leader prevents votes on unwanted amendments on a consistent basis in the face of a determined senator or a polarized minority. This is because individual senators, as well as Senate minorities more broadly, retain the ability to force votes in relation to their proposals on the Senate floor in certain circumstances. And it is this fact that has been largely overlooked by the current literature on the Senate. For example, Den Hartog and Monroe (2011, 114) acknowledge, "the Senate's amendment trees create a finite number of opportunities for offering amendments during consideration of a bill." Yet they do not explain why senators acquiesce in the continued use of these trees to block their amendments given the increased polarization in the Senate and the decline in amending activity over the past three decades. Instead, the restrictive use of the amendment trees is simply taken as a given. That is, member acquiesce to them is automatically assumed despite the fact that they have a significant impact on the ability of senators to influence policy outcomes on the floor.

This assumption is misplaced given the attention of recent scholarship to the majoritarian nature of the Senate's rules and the rising support in both parties for using the so-called nuclear option to eliminate (or restrict) the filibuster on a simple-majority vote. In addition, the Senate's amendment trees are now widely acknowledged to be an important instrument of majority agenda control due to the routinization of their use for the explicit purpose of blocking minority amendments (i.e. filling the tree). Logic would suggest that such use would be challenged when

the tactic is routinely employed to prevent members from offering amendments to legislation on the Senate floor.

In sum, we lack an explanation for why the increase in the majority's use of the amendment tree to exercise negative agenda control has not precipitated more protest from the minority. This is particularly puzzling given widespread frustration among senators in both parties with how the institution operates today and their perceived inability to meaningfully impact policy outcomes beyond casting a simple up-or-down vote to end debate on a bill or on its final disposition. We thus need to better understand the intricacies in how Senate leaders block amendments without provoking significant protests in order to solve this puzzle. Assessing the competing claims above will help inform our understanding of this important issue.

To that end, I first provide a working knowledge of the Senate's procedural architecture in order to facilitate a better understanding of its component parts and the various ways in which they can be changed. This is needed in order to fully appreciate how the Standing Rules and precedents relate to one another and together govern the amendment process.

I then review the historical construction of the precedents underpinning the amendment process and consider how they are used today. The precedents stipulating how many amendments may be pending to legislation at a given time evolved in order to facilitate the consideration of the Senate's business in an orderly manner. However, both Democratic and Republican party leaders utilize these same precedents today to block the consideration of unwanted amendments on the Senate floor. Juxtaposing the reasons behind the creation of these precedents with their current use thus provides a unique perspective on the centralization of power in the office of the majority leader and the institutional development of the Senate more broadly. Moreover, accounting for the continued adherence of senators to the precedential

restrictions governing the amendment process today draws our focus to the implications of such changes for the contemporary Senate and offers some clues as to the future course of its development if current practices continue.

I conclude with an evaluation of the competing claims identified above and consider what each portends for the Senate moving forward. Future avenues of research are also outlined.

Overview of Senate Rules and Practices

The overall structure of Senate procedure is derived from five primary sources: the Constitution; the Standing Rules of the Senate; standing orders; statutory rules passed by Congress; and informal precedents. While it is the interaction of each of these component parts that forms the procedural architecture within which the decision-making process unfolds in the Senate on a daily basis, an analysis of standing orders and statutory rules is beyond the scope of this paper.

Constitutional Basis

The Constitution contains relatively few provisions regarding the internal operation of the Senate. For example, the Senate Composition Clause sets membership qualifications, term lengths, and gives each state two senators who vote per capita.[15] Article I, section 3, clauses 4 and 5 designate the Vice President as the President of the Senate (i.e., the Presiding Officer or Chair) and authorize the Senate to choose a President pro tempore to serve as its Presiding Officer in the Vice President's absence.[16] Additionally, the Presentment Clause establishes a

[15] U.S. Const. art. I, § 3, cl. 1, 3.
[16] *Ibid.* art. I, § 3, cl. 4-5.

process for considering presidential veto messages.[17] Of these constitutional provisions, the Rules of Proceedings Clause is the most important because it gives the Senate plenary power over its rules of procedure. The clause explicitly stipulates: "Each House [*of Congress*] may determine the Rules of its Proceedings."[18] With this authority, the Senate establishes both the informal and formal parliamentary rules that govern its proceedings.

The Supreme Court ruled in 1892 that, absent a clear constitutional provision stipulating otherwise, the House of Representatives and the Senate are free to make any rules they choose pursuant to their plenary power to determine their own internal rules of procedure under the Rules of Proceedings Clause. Writing for the Court in *United States v. Ballin*, Justice David Brewer acknowledged that while "the Constitution empowers each house to determine its rules of proceedings," the House and Senate could not by their rules "ignore constitutional restraints or violate fundamental rights"[19] Other than that, the Court held that the power to make rules is exercised by a majority of each chamber and cannot be limited by rule other than as provided for in the Constitution. According to the Court's decision, the only requirement to change the rules that is stipulated in the Constitution is "the presence of a majority."[20]

As a consequence, a simple-majority of senators is constitutionally empowered to change the Senate's rules whenever it chooses to do so. But the ability of a simple-majority to change the rules does not necessarily imply that it has been historically acceptable to do so with a bare minimum of senators. Indeed, the Standing Rules of the Senate have long included a provision requiring a three-fifths majority to end a filibuster and an even greater two-thirds majority to end

[17] U.S. Const., art. I, § 7, cl. 2.
[18] *Ibid.,* at art. I, § 5, cl. 2.
[19] *United States v. Ballin*, 144 U.S. 1 (1892).
[20] *Ibid*.

debate on a proposal to change those rules. While there has been some erosion in support for these requirements in recent decades, they continue to hold normative value to this day.

Standing Rules

There are currently forty-four Standing Rules of the Senate that govern everything from non-controversial issues like the oath of office (Rule III) and the committee referral process (Rule XXVII) to controversial issues such as the process to end debate (Rule XXII). For the most part, the Senate's Standing Rules are very general and do not address circumstances that may arise in specific parliamentary situations. The Standing Rules total only seventy pages in length.

These rules remain in effect from one Congress to the next according to the concept that the Senate is a continuing body. Rule V stipulates, "The rules of the Senate shall continue from one Congress to the next Congress unless they are changed as provided in these rules."[21] To that end, Senate Rule XXII requires an affirmative vote of "three-fifths of the senators duly chosen and sworn" to invoke cloture, or end debate, on any "measure, motion, or other matter pending before the Senate…except on a measure or motion to amend the Senate rules, in which case the necessary affirmative vote shall be two-thirds of the senators present and voting…"[22] It is thus difficult to change the Senate's rules because the threshold to invoke cloture on proposals to do so (two-thirds, typically sixty-seven) is higher than that required to end debate on other measures (three-fifths, typically sixty). The super-majoritarian requirements to end debate in Rule XXII are generally viewed today as making minority obstruction possible.[23]

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[21] "Rule V: Suspension and Amendment of the Rules," *Standing Rules of the Senate* (Washington: Government Printing Office, 2007), 4.

[22] "Rule XXII: Precedence of Motions," *Standing Rules of the Senate* (Washington: Government Printing Office, 2007), 16.

[23] Wawro and Schickler (2006, 263) describe the rise of relatively costless obstruction in the decades after the adoption of the cloture rule as a "great irony" in Senate history.

A 1914 volume of precedents compiled by the Senate's Chief Clerk observed, "Regarding amendments, pure and simple, the Senate rules have but little to say" (Gilfry 1914, 32). Those that do speak to the amendment process include rules XV, XVI, and XXII. Paragraph three of Rule XV states:

> If the question in debate contains several propositions, any senator may have the same divided, except a motion to strike out and insert, which shall not be divided; but the rejection of a motion to strike out and insert one proposition shall not prevent a motion to strike out and insert a different proposition; not shall it prevent a motion simply to strike out; nor shall the rejection of a motion to strike out prevent a motion to strike out and insert. But pending a motion to strike out and insert, the part to be stricken out and the part to be inserted shall each be regarded for the purpose of amendment as a question, and motions to amend the part to be stricken out shall have precedence.[24]

One of the goals of Rule XXII is to provide finality and transparency to the legislative process through the filing and publication of amendments. The cloture rule is based on the idea that senators should only agree to invoke cloture on legislation, thereby setting up an eventual simple-majority final passage vote, once they have created a known universe of amendments that can be adjudicated post-cloture. The known universe of amendments is created by the filing deadlines for first and second degree amendments stipulated in the rule and quoted below.

> Except by unanimous consent, no amendment shall be proposed after the vote to bring debate to a close, unless it has been submitted in writing to the Journal Clerk by 1 o'clock p.m. on the day following the filing of the cloture motion if an amendment in the first degree, and unless it had been so submitted at least one hour prior to the beginning of the cloture vote if an amendment in the second degree.[25]

Finally, the Senate's Standing Rules impose germaneness requirements on amendments in certain circumstances. Specifically, Rule XXII states, "No dilatory motion, or dilatory amendment, or amendment not germane shall be in order" during post-cloture consideration of

[24] "Rule XV: Amendments and Motions," *Standing Rules of the Senate* (Washington: Government Printing Office, 2007), 10.

[25] "Rule XXII: Precedence of Motions," 16.

legislation.[26] However, the rule itself does not provide a definition of germaneness. Rather, the very next sentence clearly states that the Chair shall decide "questions of relevancy" without debate and that the full Senate will determine germaneness on appeal of the Chair's ruling. Similarly, paragraph 3 of Rule XVI states that

> …no amendment offered by any other Senator which proposes general legislation shall be received to any general appropriation bill, nor shall any amendment not germane or relevant to the subject matter contained in the bill be received; not shall any amendment to any item or clause of such bill be received which does not directly relate thereto; nor shall any restriction on the expenditure of the funds appropriated which proposes a limitation not authorized by law be received if such restriction is to take effect or cease to be effective upon the happening of a contingency.[27]

Yet as with Rule XXII, the rule does not provide a definition of germaneness.

Precedents

Finally, and most significantly for our purposes here, the Senate operates on a daily basis largely according to informal rules established pursuant to a collection of precedents. According to the late Senator Robert C. Byrd (D-West Virginia), "Precedents reflect the application of the Constitution, statutes, the Senate rules, and common sense reasoning to specific past parliamentary situations" (Byrd 1991, 52). Former Senate Parliamentarian Floyd M. Riddick argued that precedents embody the practices of the Senate pursuant to the Constitution, its Standing Rules, and any relevant rule-making statutes. These practices serve to "fill in the gaps" contained in these procedural authorities when they fail to address specific parliamentary situations (Riddick 1978; Lawrence 2013). In this sense, the impact of precedents on Senate

[26] "Rule XXII: Precedence of Motions," 16.

[27] "Rule XVI: Appropriations and Amendments to General Appropriations Bills," *Standing Rules of the Senate* (Washington: Government Printing Office, 2007), 11.

procedures is similar to that of judicial decisions in case law. Both have the force of formal laws and are thus binding in the same way on future action.

Precedents are particularly important in filling in the gaps of the Senate's Standing Rules regarding amendments. For example, the definition of germaneness utilized by the Senate today when considering amendments is largely a creature of precedent. As noted, Rule XXII makes only a passing reference to the question of germaneness. It stipulates: "No dilatory motion, or dilatory amendment, or amendment not germane shall be in order" during post-cloture consideration of legislation.[28] However, the rule itself does not provide a definition of germaneness. Rather, the very next sentence states that the Presiding Officer shall decide "questions of relevancy" without debate and that the full Senate will determine whether or not the amendment is germane on appeal of the Chair's initial ruling. Both the effect of the Chair's rulings and any subsequent appeals create precedents that flesh out and define this germaneness standard. It is the cumulative outcome of these adjudicated questions of order that provides, in part, the definition of germaneness used in the Senate today.[29]

Similarly, the Senate majority leader has the right of first recognition pursuant to precedent.[30] This precedent serves as the foundation on which the power of centralized party leadership is based in the contemporary Senate. Since any member can technically make a motion to consider legislation or a nomination under the Senate's rules, being the first to do so enables the majority leader to set the schedule and control the agenda to a limited degree. Priority of recognition also allows the leader to block votes on undesirable amendments. The

[28] "Rule XXII: Precedence of Motions," 16.

[29] Between 1965 and 1986, the Senate adjudicated 213 questions of order. During this period, 159 (74.6%) involved determinations as to whether particular amendments were in order for floor consideration. Of these, 15.5% determined the germaneness of amendments proposed post-cloture or under unanimous consent agreements requiring that all amendments be germane (Bach 1989, 14-15).

[30] The Senate majority leader was first granted priority of recognition in 1937 as a result of a ruling made by Vice President John ("Cactus Jack") Nance Garner while presiding over the Senate (Riddick and Frumin 1992, 1098).

ability to be recognized first before other members enables the majority leader to fill the amendment tree, or offer the maximum allowable number of amendments to legislation, and file cloture on a bill before other senators have a chance to debate the measure and offer amendments.

The amendment process itself is governed by "general principles" (Riddick and Frumin 1992, 25). As with the Senate's germaneness standard, these principles have been established by precedent and not by the Senate's Standing Rules. Put simply, the amendment process (and its restraints) followed in the institution today evolved over the years and is based on a continued interpretation of past parliamentary practice. Those precedents stipulate the nature of amendment that may be offered at a particular point in time (i.e. first or second degree; perfecting or substitute). According to precedent, "Any senator recognized is entitled to offer an amendment when such amendment is otherwise in order, but he cannot offer an amendment unless he has been recognized or has the floor" (Riddick and Frumin 1992, 45). The process of filling the amendment tree thus follows precedent to block members from offering their own amendments.

Precedents can be created by one of three methods in the Senate. First, they can be established pursuant to rulings of the Presiding Officer, or Chair, on points of order against violations of the Senate's rules, as in the germaneness example discussed above. These rules are not self-enforcing and violations that do not elicit points of order do not necessarily create new precedents. The second method by which a precedent can be created is pursuant to a vote of the full Senate on an appeal of the Presiding Officer's ruling on a point of order. Finally, responses by the Presiding Officer to parliamentary inquiries may also create new precedents.[31] While such responses are generally treated as non-binding on the Senate, they do gain precedential value

[31] The word *see* in *Riddick's Senate Procedure* designates precedents resulting from parliamentary inquiries. It is important to note that such precedents are not considered as binding on the Senate as those established pursuant to a definitive action such as a ruling of the Presiding Officer or a vote of the full Senate.

over time to the extent that parliamentary inquiries provide future senators with insight into past parliamentary practice.

The Historical Construction of the Senate's Amendment Process

As noted above, the amendment process is governed by general principles that provide the foundation for Senate rules XV, XVI, and XXII, as well the numerous precedents that help clarify procedural ambiguities that may arise under these rules in particular parliamentary situations. These principles are derived from English parliamentary law and were first compiled for the Senate in *A Manual of Parliamentary Practice for the use of the Senate*, which was written by Thomas Jefferson during his tenure as Vice President and President of the Senate (1797-1801). Jefferson's intention was to give members of the Senate additional procedural guidance in situations for which the institution's first twenty-four Standing Rules did not provide explicit direction. In the absence of such guidance, Jefferson feared that the Senate's deliberations would fluctuate between chaos and heavy-handed majority rule.

During the first decade of the Senate's history, its Standing Rules offered considerably less guidance for how the amendment process should be conducted than they do today. Adopted in April 1789 during the First Federal Congress, the first set of Standing Rules merely stipulated that amendments would be considered before other motions (e.g. to adjourn) and that no bill could be amended until it had been read twice. Rule X, which would eventually become today's Rule XV, simply stated, "If a question in debate contains several points, any member may have the same divided."[32] Then, as now, precedents were needed to fill in the gaps created by the ambiguities inherent in the Senate's Standing Rules. In the absence of additional authorities,

[32] Apr. 16, 1789, 1-1, *Journal*, p. 13.

senators were left to turn to general parliamentary law as documented in the *Manual* for procedural guidance when establishing these precedents.

Jefferson discerned "general parliamentary law" by consulting the Constitution, the Senate's rules, "and where those are silent…the rules of Parliament" (Jefferson 1993, *xxviii*). According to the *Manual*, committee amendments are considered before floor amendments (Jefferson 1993, 44). Legislative text cannot be amended more than once. As a consequence, legislators should have an opportunity to amend text proposed to be stricken and/or inserted before the actual vote to strike/insert said text (57 and 61). Additionally, motions to commit have precedence over motions to amend (54). Finally, amendments may be amended in the second degree but third degree amendments are not in order (56).[33]

These principles were invoked in order to facilitate the orderly consideration of the Senate's business without compromising legislative deliberation. Reducing confusion in the amendment process was particularly important in the early Senate because it chose not to adopt the practice followed at the time in the House of Commons, and adhered to in the new House of Representatives, of amending bills by paragraph (Jefferson 1993, 40-42). Jefferson acknowledged that even though considering amendments in this manner presented some challenges, it also produced "advantages overwhelming their [*sic*] inconveniences" (41).

As a consequence, the practices by which the early Senate governed the amendment process sought to balance the need for order with the imperative of deliberation. That is, the latter was only subsumed to the former when it was absolutely necessary. This is reflected in Jefferson's discussion of the prohibition on third degree amendments.

[33] It is interesting to note that Jefferson does not cite a parliamentary authority in support of his prohibition against third degree amendments. In contrast, other references to past parliamentary practice are properly cited throughout the *Manual*.

> If an amendment be moved to an amendment, it is admitted. But it would not be admitted in another degree: to wit, to amend an amendment to an amendment, of a M.[*ain*] Q.[*uestion*]. This would lead to too much embarrassment. The line must be drawn somewhere, and usage has drawn it after the amendment to the amendment (Jefferson 1993, 56).

Put simply, the prohibition was designed to impose order on the process of offering amendments. It was meant to avoid unnecessary confusion. The prohibition was not intended to provide certain senators with a means by which they could block others from offering amendments to legislation. This last point is affirmed by the next two sentences immediately following Jefferson's definition of a third degree amendment.

> The same result must be sought by deciding against the amendment to the amendment, and then moving it again as it was wished to be amended. In this form it becomes only an amendment to an amendment (Jefferson 1993, 56).

The expectation was that while an amendment in the third degree would be out of order, an identical amendment in the second degree would be allowed once that spot opened up on the tree.

The prohibition on third degree amendments was tolerated because the benefits derived from a more manageable process outweighed the costs imposed by temporarily limiting legislative deliberation. However, members had little need to resort to Jefferson's prohibition on offering an amendment to an amendment to an amendment of a main question for much of the Senate's early history. Nevertheless, maintaining order in the Senate became more important as the size of its membership increased and the institution considered more controversial legislation. As a consequence, some of the first third degree amendments were not ruled out of order until the 1840s and 1850s.[34] Third degree amendments were not routinely offered (and subsequently

[34] For example, see: Mar. 3, 1849, 30-2, *Congressional Globe*, pp. 682-683; Mar. 31, 1858, 35-1, *Congressional Globe,* pp. 1417-1418.

ruled out of order) until the 1870s.[35] A cursory review of these debates conveys the general sense of confusion and disorder that commonly characterized the consideration of legislation on the Senate floor before the advent of televised proceedings, computers, and staff to help members keep track of everything.

The prohibition on third degree amendments was thus not imposed to protect a bill from poison pill amendments. To do so would have been inconsistent with the general parliamentary practice followed at the time. Jefferson quotes eighteenth century practice in the House of Commons,

> Amendments may be made so as totally to alter the nature of the proposition, and it is a way of getting rid of a proposition, by making it bear a sense difference from what was intended by the movers, so that they vote against it themselves (Jefferson 1993, 61).

A clerk serving in the Commons during this period observed, "This, perhaps, is not quite fair, but has been often done" (Hatsell 1818, 117). Such amendments were tolerated because they were perceived to be instrumental in discerning the true sense of the institution on any given question.

With that being said, the early amendment trees to which the principles of general parliamentary law gave rise could be rather limiting, particularly when measured against the contemporary practice. For example, the requirement that legislators have an opportunity to amend text proposed to be stricken and/or inserted before the actual vote to strike and/or insert said text, coupled with the stipulation that a main question could only be amended in the second degree suggests that no more than two amendments could be pending before the Senate at the same time. In addition, the prohibition on third degree amendments precluded members from perfecting second degree amendments before they received a final vote.

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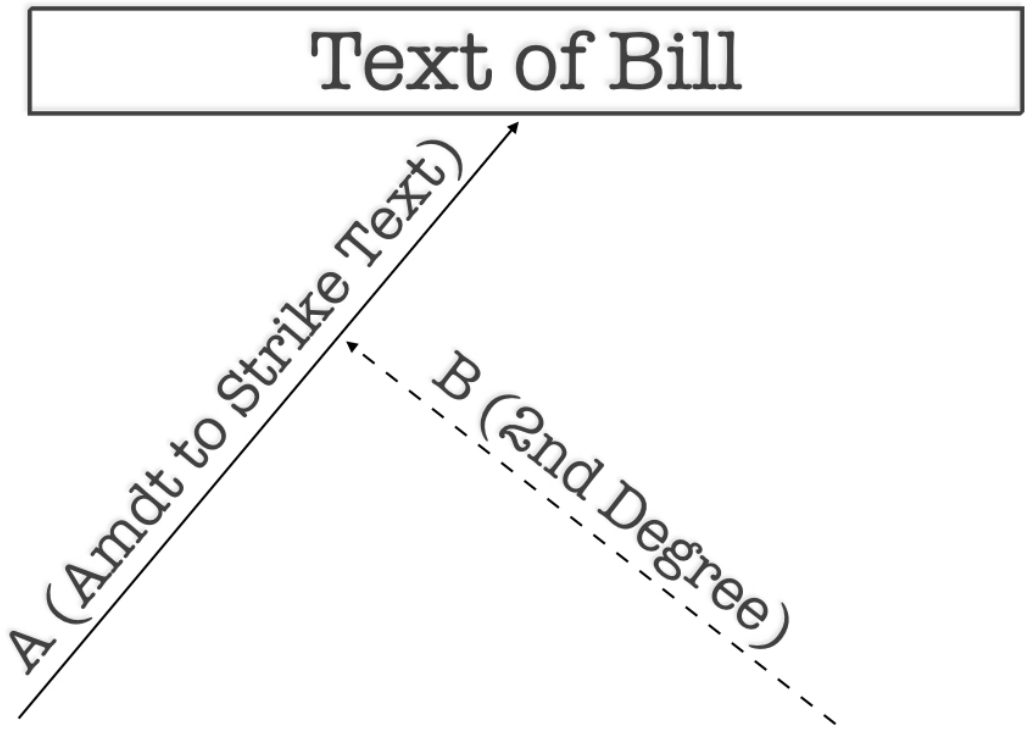
[35] For example, see: June 7, 1870, 41-2, *Congressional Globe*, p. 4166; July 14, 1870, 41-2, *Congressional Globe*, p. 5574; Jan. 6, 1874, 43-1, *Record*, pp. 392-394; Mar. 30,1874, 43-1, *Journal*, p. 395; Mar. 31, 1874, 43-1, *Journal*, p. 398.

A volume of eighteenth century precedents from the House of Commons provides examples of the relatively straight-forward amendment process depicted in Jefferson's *Manual*. Figure 1 depicts an early amendment tree based on a motion to strike.

Figure 1: Early Amendment Tree Based on Motion to Strike



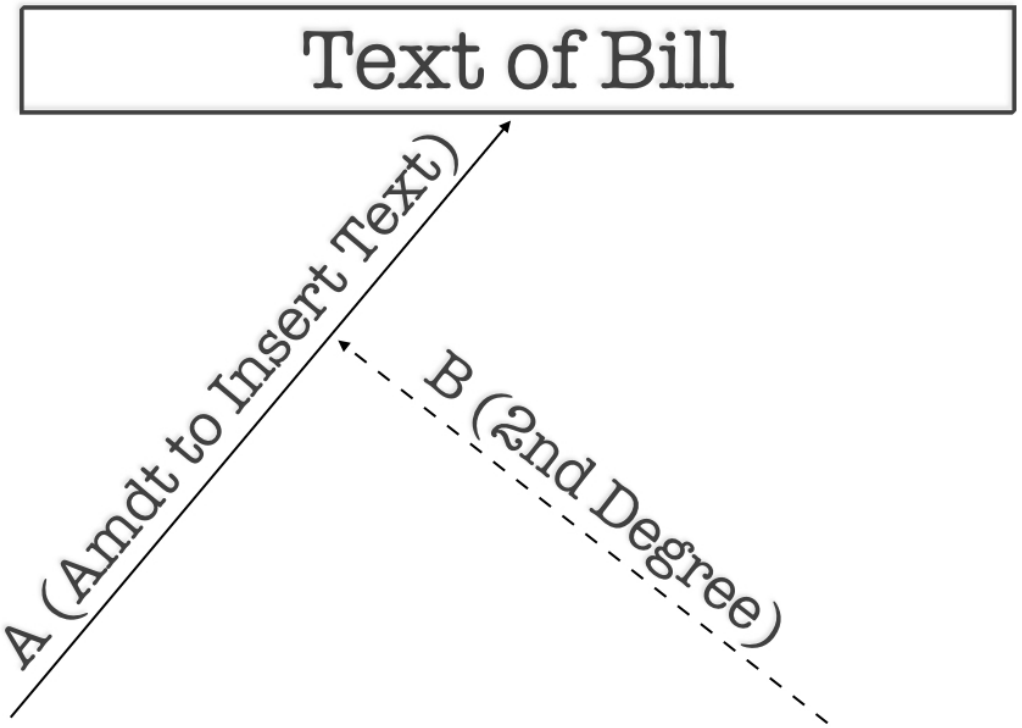
In this example, a member offered an amendment (branch *A*) to strike text from the underlying bill. Another member subsequently moved an amendment (branch *B*) to strike part of the text to be stricken by the first amendment, the effect of which would be to retain a part of the original text proposed to be stricken by the first amendment (Hatsell 1818, 110).[36] In this instance, the

[36] This particular precedent occurred on 13 November 1755.

general principles of parliamentary law permitted the second member to perfect the underlying text proposed to be stricken before a vote on the original motion to strike.

Figure 2 depicts another early amendment tree from the Commons. However, this tree is based on a motion to insert (Hatsell, 1818, 193).[37] Here, a member proposed an amendment (branch *A*) to insert text in the underlying bill.

Figure 2: Early Amendment Tree Based on Motion to Insert



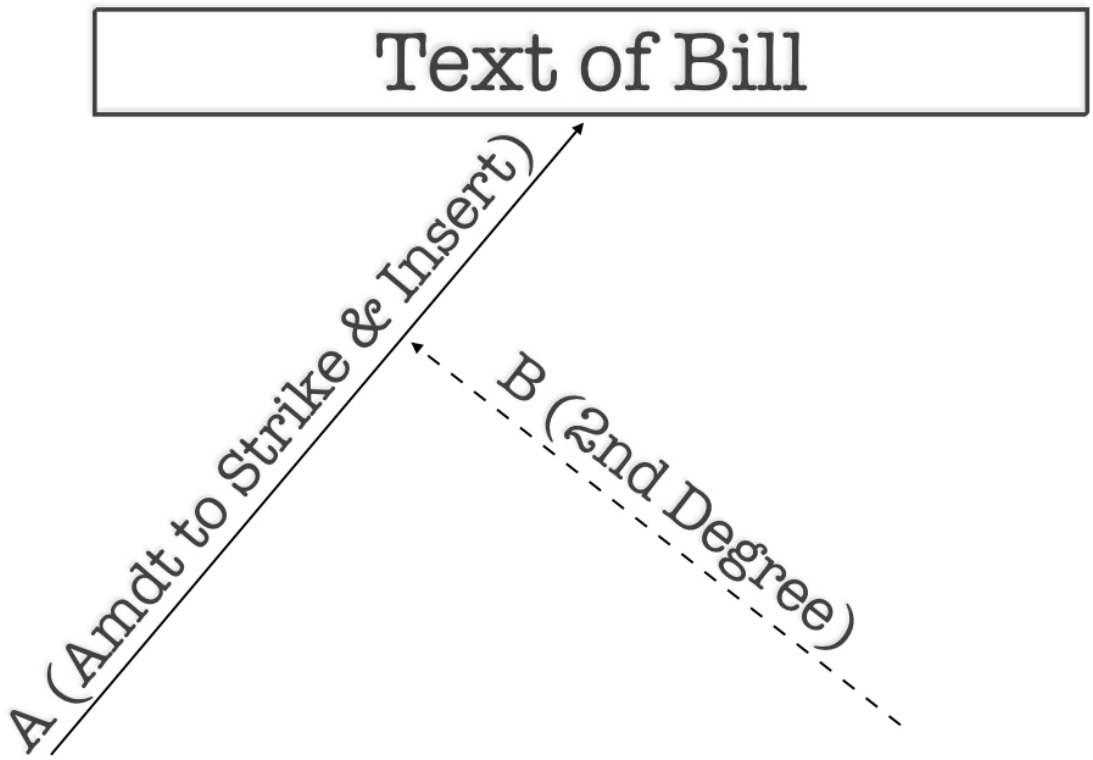
[37] This precedent is based on events occurring on 24 March 1709 and 21 January 1728.

Pursuant to the requirement that text proposed to be inserted shall be open to amendment prior to a final vote on that text, another member was afforded the opportunity to move to perfect the words proposed to be inserted by the first amendment (branch *B*).

The early practice governing compound motions to strike *and* insert is less clear. Jefferson covers all three forms of amendment in the *Manual* and he explicitly acknowledges that an amendment to the text proposed to be stricken/inserted is in order before a vote on the amendment to strike/insert. Yet he does not make a similar observation with regard to the compound motion to strike and insert, which he considers immediately following the discussion on amendments to strike/insert. Instead, Jefferson implies that such motions are not open to further amendment and that alternatives to them must wait until the first motion is rejected before being offered. However, the early Senate appears not to have followed Jefferson's parliamentary guidance here. Instead, motions to strike and insert were considered in the same way as other amendments. For example, Figure 3 depicts a motion to strike and insert from the early nineteenth century.[38] Here, Senator Samuel A. Foote (Connecticut) moved to strike out certain words in a proposition and to insert others in lieu thereof (branch *A*). Senator John Macpherson Berrien (Georgia) then moved to strike certain words in the Foote amendment and to insert others (branch *B*).

[38] See Feb. 12, 1828, 20-2, *Journal*, p. 151.

Figure 3: Early Amendment Tree Based on Motion to Strike and Insert



Each of these examples illustrates a relatively straight-forward approach to the amendment process. That is, senators would offer amendments to the main question *ad seriatim* until no other amendments were permitted or the members were satisfied with the underlying bill. Similarly, members would offer second degree amendments *ad seriatim* to the pending first degree amendment until further amendments were precluded or the members were satisfied with its text and thus ready to move on.

Furthermore, no more than two amendments are pending before the chamber at the same time in each example. From this point on, this paper will refer to this as a prohibition against

horizontal third degrees. According to Senator Henry Cabot Lodge (R-MA), a former President pro tempore and Senate majority leader, "The number of amendments pending is the test of the degree of the amendment."[39] Horizontal third degree amendments thus represent competing first and second degree amendments that are not in order under the Senate's precedents because the amendment tree has been filled. In addition, no amendment is pending beyond the second degree in any of the examples. This reflects the prohibition on offering an amendment to an amendment to an amendment. From this point on, this paper will refer to this as a prohibition on vertical third degrees.

Now consider the amendment trees followed in the Senate today. Chart 1 depicts the procedural options if a motion to insert text is the first amendment offered on the floor (see Figure 4).

[39] June 10, 1914, 63-2, *Record*, p. 10128.

Figure 4: Chart 1- Motion to Insert Text

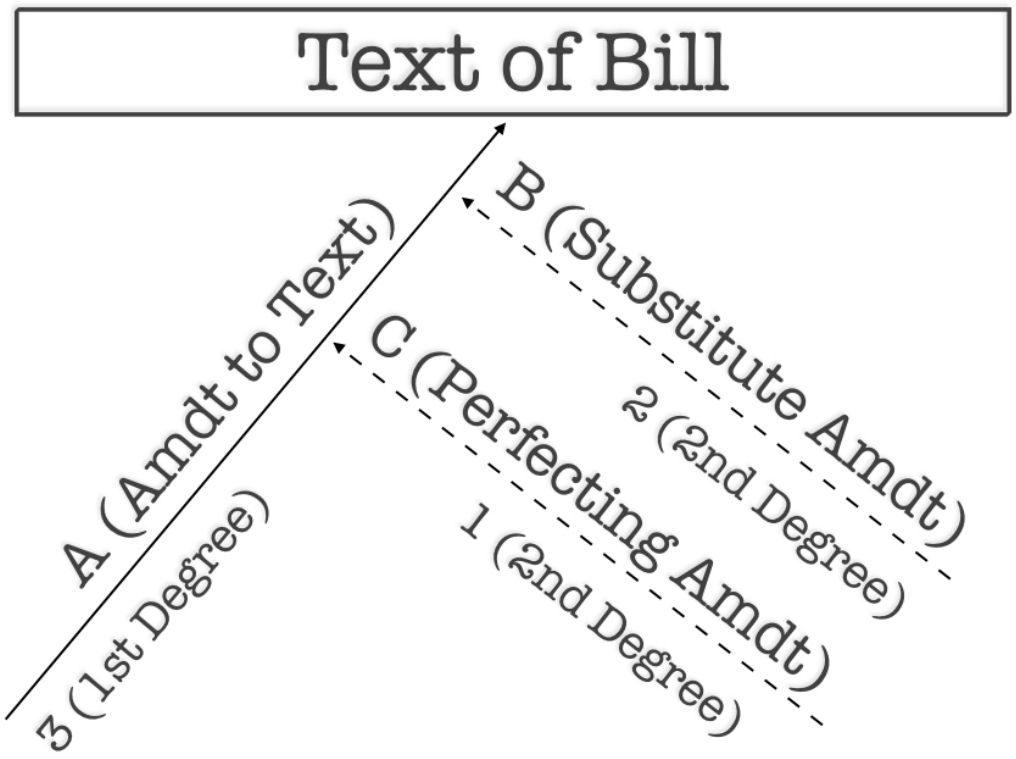


Chart 1 differs from the amendment tree depicted in Figure 2 in that two second degree amendments are pending to the first degree amendment at the same time (branches *B* and *C*).

Chart 2 depicts the amending opportunities available to senators if a motion to strike text from the underlying bill is the first amendment offered on the Senate floor (see Figure 5).

Figure 5: Chart 2- Motion to Strike Text

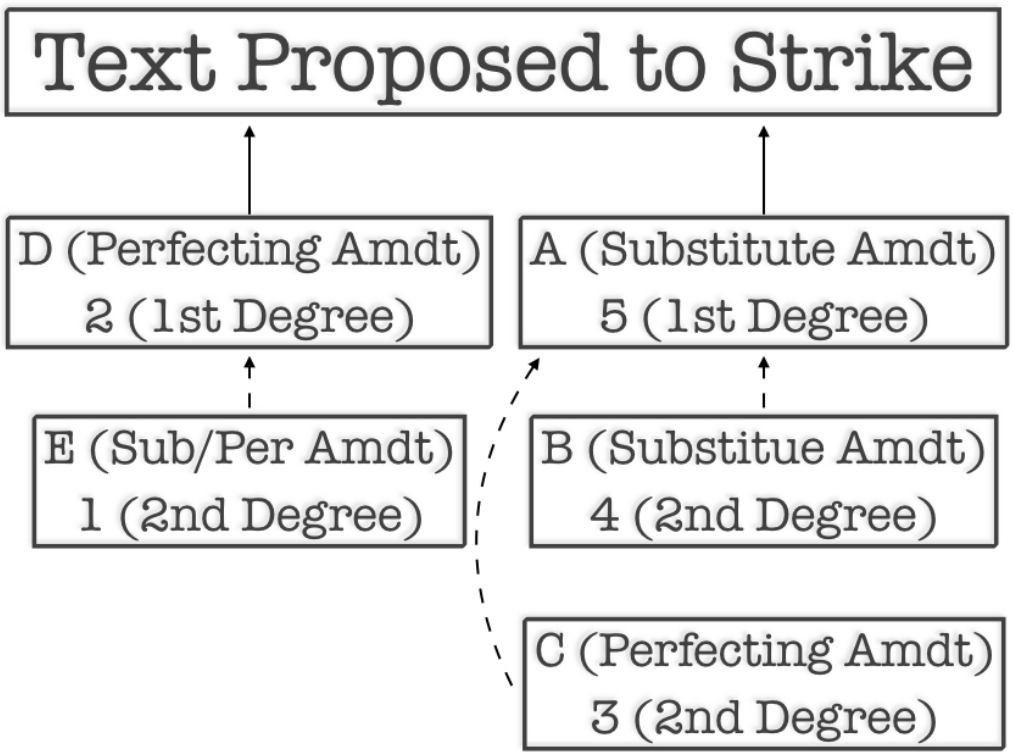
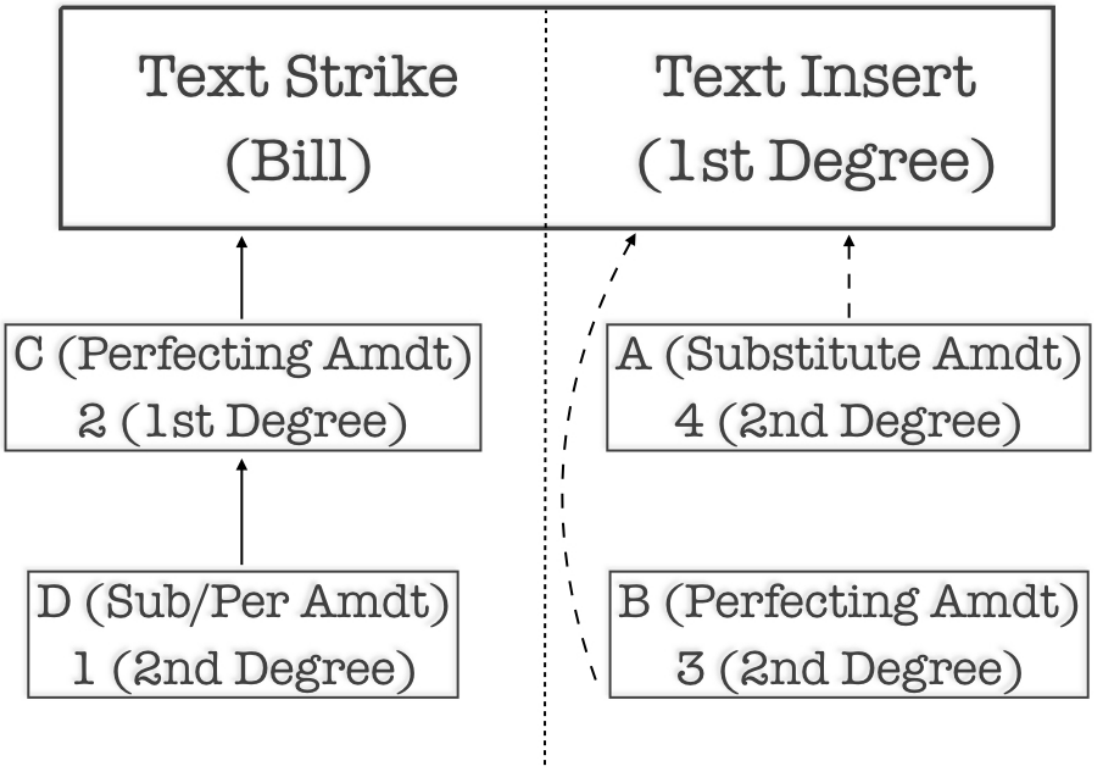


Chart 2 differs from the early amendment tree depicted in Figure 1in that it does not count the amendment to strike against the limit on the number of amendments allowed to be pending to legislation at the same time. In addition, it allows for two first degree and three second degree amendments to be pending to the underlying bill at the same time (branches *A* and *D*, and *B*, *C*, and *E*, respectively). In contrast, there are only two amendments pending to the underlying bill in Figure 1: the motion to strike (first degree) and an amendment to the motion to strike (second degree).

Chart 3 depicts the amending opportunities that arise when a substitute for a section of the underling bill (i.e. motion to strike and insert) is the first amendment offered on the Senate floor (see Figure 6).

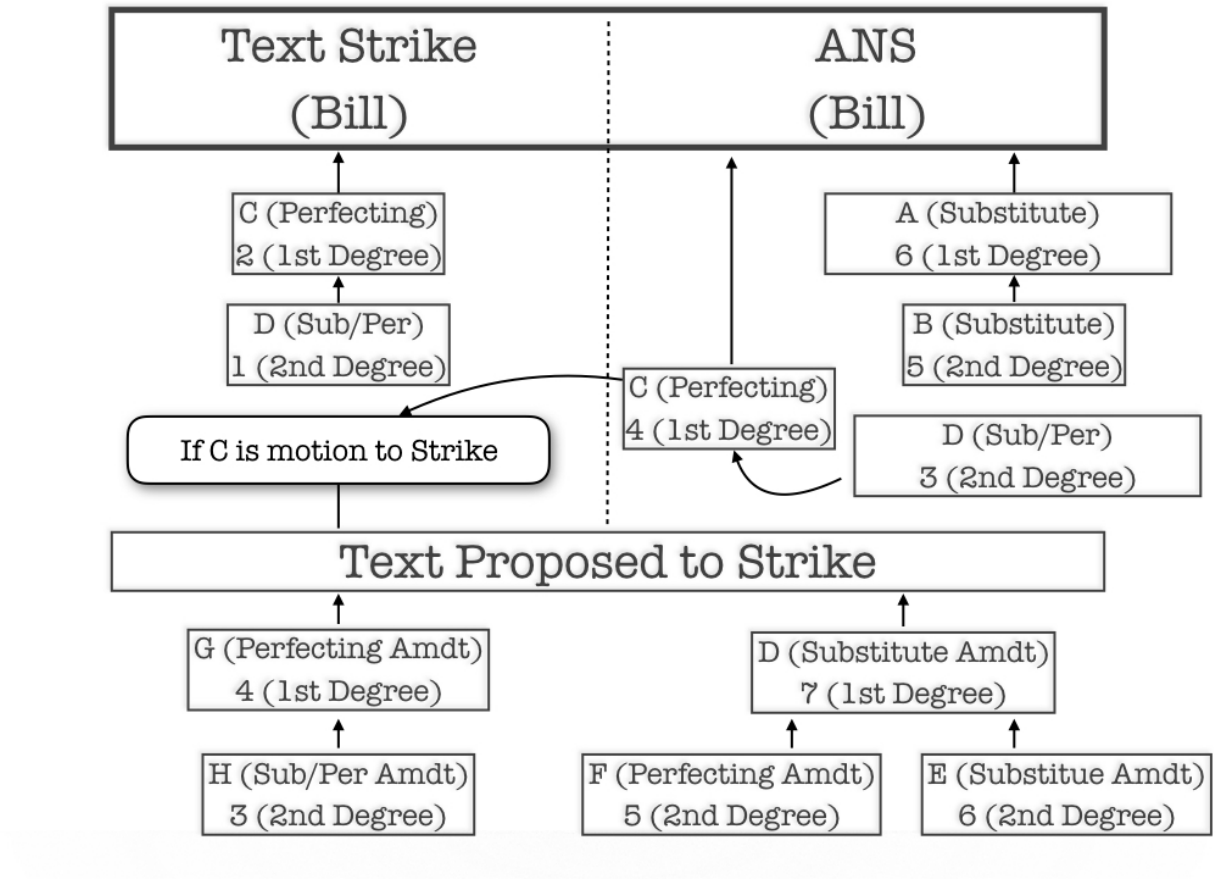
Figure 6: Chart 3- Motion to Strike and Insert (Substitute for Section of Bill)



Unlike the early amendment tree depicted in Figure 3, the modern process depicted in Chart 3 permits four amendments to be pending alongside the original motion to substitute text for a section of the underlying bill (two first and three second degree amendments vs. one first degree and one second degree amendment).

Finally, Chart 4 depicts the parliamentary situation that arises when the first amendment offered on the Senate floor is a full text substitute for the underlying bill (i.e. an amendment in the nature of a substitute; ANS).

Figure 7: Chart 4- Motion to Strike and Insert (ANS)



Under Chart 4, up to five first degree and six second degree amendments can be pending to the underling bill (or ANS) at the same time.

The contemporary trees are more complex than the practice followed in the eighteenth century House of Commons and in the early Senate. Yet despite this complexity, each branch remains based, in part, on the general principles of English parliamentary law identified above.

The modern trees simply reflect the Senate's conscience resolution of the instances in which these principles conflict.

Despite the complexity of the modern trees, order is still maintained by adhering to the principles of precedence. According to the *Manual*, "it is a general rule that the question first moved and seconded shall be first put. But this rule gives way to what may be called Privileged questions; and the Privileged questions are of different grades among themselves" (Jefferson 1993, 50). In this context, privilege is assigned to amendments based on one of the principles of parliamentary law. For example, "When it is proposed to amend by inserting [striking] a paragraph or part of one, the friends of the paragraph may make it as perfect as they can by amendments, before the question is put for inserting [striking] it" (Jefferson 1993, 61). This is because the legislative text cannot be amended more than once. With this language, the Senate gradually decided to circumvent the other prohibitions on horizontal and vertical third degree amendments reflected in the general parliamentary law and observed in Senate practice over the course of the eighteenth and early nineteenth centuries. In this sense, the amendment trees followed in the contemporary Senate contradict the principles and early practice as articulated in the *Manual* in that they all permit either horizontal and/or vertical third degree amendments.

That the Senate modified its practice over time in order to expand the number of amendments that were allowed to be pending at the same time was consistent with the nature of precedent and helped the institution maintain balance between the twin imperatives to maintain order and to facilitate deliberation inherent in its amendment process. A brief survey of the key developments in the evolution of the amendment trees suggests that the primary factor in each instance was the desire to make the amendment process more responsive to the needs of rank-

and-file senators, thereby facilitating legislative deliberation, while preserving order in what would otherwise be the chaotic environment of the Senate floor.

Key Developments in the Evolution of the Senate's Amendment Trees

Most of the modifications to the procedures governing the amendment process were established by the creation of new precedents. However, one of the most important changes was established by the adoption of a new Standing Rule in 1874. The principles articulated in the debate that preceded the adoption of this rule, as well as the rule itself, underpin Charts 3 and 4. These principles would also gradually be applied to Charts 1 and 2 in the ensuing years. It thus makes sense to begin our historical survey with Chart 4 and the adoption of the 1874 rule.[40]

Chart 4

The amendment tree depicted in Chart 4 is the most complex process permitted in the Senate today (absent unanimous consent). It is also the one most commonly followed on the Senate floor. Given this complexity and ubiquity, it makes sense that parliamentary situations arising under it would conflict with the limited nature of the amendment process as it existed in the early Senate.

While there is some indication that the Senate periodically set aside its restrictive procedures by unanimous consent in order to accommodate a process analogous to that depicted in Chart 4, the fact remains that the institution's rules and practices at the time precluded most of

[40] The following examination is not meant to represent a definitive analysis of the precedents governing the Senate's amendment process. Such an examination is beyond the scope of this paper. The precedents cited in this section do not necessarily represent the first instance in which the Senate altered its procedures for considering amendments. The amendment process was highly variable for much of the Senate's history. This variability would not be reduced until the institutionalization of the office of the parliamentarian in the mid-twentieth century and the rise of Senate party leadership. Nevertheless, the precedents cited here do signal important shifts in how the Senate structured its amendment process from that point on and feature substantive debates between members that help shed light on how they understood the process to work at a particular point in the institution's history.

the branches observed on the tree today.[41] For example, the prohibition on vertical third degree amendments would preclude *B*, *D*, *E* (lower half), *F* (lower half), and *H* (lower half). Additionally, the prohibition on horizontal third degree amendments would preclude more than two amendments from being made pending at the same time. That is, only one other amendment could be pending before the Senate in addition to the ANS (i.e. the right side of the tree). This would preclude *A*, *C*, *E*, *G* (lower half), and/or *D* (lower half) from pending at the same time. It would also preclude all second degree amendments listed on the Chart (*B*, *D*, *F* in the upper half and *E*, *F*, and *H* in the lower half) because only the ANS and one first degree amendment could be pending at the same time under the prohibition on horizontal and vertical third degree amendments.

What would eventually become Chart 4 was made possible by the Senate's adoption of a new Standing Rule in 1874. Specifically, the Senate modified the procedures by which it considered amendments in the nature of a substitute (ANS). During consideration of legislation relating to currency and the banking system (S. 617; left side of the tree in Chart 4), Senator Augustus Summerfield Merrimon (D-North Carolina) offered an amendment in the nature of a substitute (Merrimon ANS) to the bill. Senator Oliver H. P. T. Morton (R-Indiana) offered an amendment to strike a section of the underlying bill (branch *E* on Chart 4; left side of the tree).

At this point, two amendments were pending before the Senate (Merrimon ANS and Morton) and under the institution's precedents, no further amendments were permitted until after one (or both) of the pending amendments were disposed of in some way. To offer an amendment to either the Morton amendment (in what would be branch *F* on left side) or to the Merrimon ANS (branches *A* or *C* on right side) would be a violation of the prohibition on horizontal third

[41] In that sense, it is similar to how the Senate routinely considers amendments today- by setting aside the rules via unanimous consent to make an amendment pending.

degrees because more than two amendments would then be pending before the Senate at the same time.

The Chair had consistently applied this rule to other amendments during the consideration of S. 617 up until that point.[42] For example, the Chair ruled that an earlier amendment offered by Morton was not in order because the Merrimon ANS and an amendment offered by Senator John A. Logan (R-Illinois; branch *C* on right side) were then pending. Additionally, the Chair sustained a point of order (p/o) against an amendment offered by Senator Hannibal Hamlin (R-Maine) to an amendment offered by Morton to the underlying bill (branch *F* on left side) because it was a horizontal third degree amendment. Unable to process multiple amendments at one time, senators were left with no choice but to alternate back and forth between amending the left and right sides of the tree (S. 617 and the Merrimon ANS, respectively). Amendments offered to either side would have to be disposed of prior to another being offered.

At this point, Senator John Sherman (R-Ohio) offered an amendment to the Morton amendment (branch *F* on the left side) for the express purpose of adjudicating the Chair's application of the Senate's precedents. "I simply wish to raise the question formally as to the right to perfect the section proposed to be stricken out."[43] Senator Thomas W. Ferry (R-Michigan) subsequently raised a p/o against the Sherman amendment on the grounds that it was an amendment in the third degree (horizontal) and therefore not in order. The Chair initially advised that the Sherman amendment was not in order prior to submitting the p/o to the decision of the Senate.

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[42] The Chair ruled out of order three first degree amendments and one second degree amendment on the same grounds. These were the Simon Cameron (R-Pennsylvania) second degree amendment to the Logan amendment to the Merrimon ANS; a Morton amendment to the underlying bill; A Hamlin amendment to the Merrimon ANS; and a Logan amendment to the underlying bill.

[43] Mar. 31, 1874, 43-1, *Record*, p. 2613.

Two sides emerged during the subsequent debate. On one side were those senators who agreed with the Chair that a motion to strike out and insert constituted one question under the rules and precedents of the Senate. As a consequence, the Merrimon ANS was one of the propositions allowed to be pending before the Senate. The Morton amendment was the second. No further amendment was in order. According to the Chair,

> The rule in regard to amendments is one of convenience merely, and designed to prevent the confusion which would result from piling proposition upon proposition without end. The rule of parliamentary law is that amendments can only be moved in the second degree; that is, there can never be more than three undetermined propositions before the Senate at any one time: first, the bill; second, an amendment; third, an amendment to an amendment…The object intended to be secured by the rule must be kept in view, which is, not to multiply beyond three undetermined questions before the Senate.[44]

On the opposite side were several senators who disagreed with the Chair's narrow construction of the Senate's precedents. Specifically, they contended that the amendment process to which such an interpretation gave rise was insufficiently flexible to foster adequate legislative deliberation. For example, Roscoe Conkling (R-New York) highlighted one of the effects of the Chair's interpretation of the rule, which was "to cut off all amendments, to preclude every other Senator from offering any amendment whatever, because an amendment, if offered would be in the third degree, and therefore would be out of order."[45]

Sherman argued that the Senate's prior practice had been to treat ANS by consent "as separate text open to amendment in the second degree" and that failure to do so moving forward "would be exceedingly inconvenient in the ordinary management of the business of the Senate."[46] Sherman argued that the Chair's ruling strictly enforcing Rule XII was too restrictive to allow the Senate "to conduct the ordinary business of the country" because it impeded

[44] Mar. 31, 1874, 43-1, *Record*, p. 2604.
[45] *Ibid*., p. 2518.
[46] *Ibid*., p. 2604.

legislative deliberation.[47] The Senate was, in effect, presented with a *fait accompli*. If it wanted to amend the section proposed to be stricken by the Morton amendment, then it would have to vote down the Morton amendment no matter how small a change. Morton would first have to be rejected. According to Sherman,

> In other words, if there is the slightest variation, to the doting of an *i* or the crossing of a *t*, or a misrecital of fact or a misrecital of a section, you cannot amend I; and the only way you can correct that formal error is by a motion to strike out the whole section and substitute a new section in correct form.[48]

Sherman cites general parliamentary law as documented in Jefferson's *Manual* in support of his position.

> If there is no way to amend it, if we have got either to vote to strike it out or take it as a whole, almost any affirmative proposition would be stricken out. That, it seems to me, reverses the whole logic of parliamentary law which is intended by simple and plain rules to enable the majority to perfect the proposition before it, to reach a vote on the substantial points, and settle the matter in that way.[49]

The effect of the Chair's ruling, according to Senator Allen G. Thurmon (D-Ohio), was to essentially block members from offering further amendments. "You utterly deprive the friends of the measure an opportunity to perfect it before the motion is made to strike it out."[50]

Members instead contended that an ANS constituted two separate questions: the text of the underlying bill proposed to be stricken and the text proposed to be inserted. According to the principles of general parliamentary law, amendments should be allowed to both. As a consequence, the text of the substitute proposed to be inserted should be treated as an original question for purposes of amendment. In this particular case, the consequence would be to allow three amendments to be pending at the same time (i.e. horizontal third degrees). Hamlin, argued in support of a broad construction of the rule. "You divide your proposition and you have

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[47] Mar. 31, 1874, 43-1, *Record*, p. 2613.
[48] *Ibid*.
[49] *Ibid*., p. 2614.
[50] *Ibid*.

virtually two substantial propositions pending before the Senate, or a proposition with two branches, either of which admits an amendment."[51] In short, Sherman and his allies argued that the practice at the time, if rigidly applied, preserved order at the expense of the Senate's ability to deliberate. "You move to strike out a section; the section is open to double amendment, in the first degree and in the second degree. That has been the practice, and it is only in that way that you can get at the wish of the Senate."[52] Sherman argued that it would be difficult, if not impossible, to truly understand the will of the Senate absent a deliberative process on the floor. In contrast, advocates for a narrower construction of Rule XII observed that failure to adhere to the practice would undermine order. They instead emphasized the difficulties that would confront the Senate in the absence of a limit on the number of amendments that could be pending at the same time.

The Senate adopted the following change to Rule XII by unanimous consent at the end of the debate.

> That the twelfth rule be so amended that, pending a motion to strike out and insert, the part to be stricken out and the part to be inserted shall each be regarded for purposes of amendment as a question, and motions to amend the part to be stricken out shall have precedence.[53]

While the new Rule XII laid the foundation for what would eventually become the amendment tree depicted in Chart 4, it is important to note that the 1874 precedent did not speak to every branch featured on it. Instead, it simply codified the occasional practice that an ANS would not count as an amendment for the purposes of enforcing the prohibition on horizontal and vertical third degree amendments. As the Chair would eloquently put it in 1977, "Under the precedents

[51] Mar. 31, 1874, 43-1, *Record*, p. 2604.
[52] *Ibid*., p. 2615.
[53] *Ibid*., p. 2643.

of the Senate, the first full substitute for the bill does not kill a degree. It is a freebie."[54] The effect was to allow two other amendments to be pending at the same time in addition to the ANS. In this particular case, *E* and *F* on the left side of the tree were allowed to be pending along with the ANS. The logical implication is that *A* and *B*, or *A* and *C*, or *C* and *D*, could each be pending at the same time. Additionally, *A* and *E* could also be pending simultaneously. In the case of *B* and *D*, the 1874 rule permitted what had previously been considered vertical third degree amendments.

The 1874 rule did not adjudicate those situations depicted in Chart 4 where more than two amendments could be pending simultaneously (in addition to the ANS). Additionally, it did not resolve the ambiguity on when the rule would apply to amendments other than an ANS. As written, the new rule technically applied to any motion to strike and insert pending before the Senate. However, the debate at the time focused only on applying the rule to those situations when an ANS was the first amendment offered on the Senate floor.

This ambiguity was not resolved until the 1890s. Specifically, the Senate expanded the amendment tree depicted in Chart 4 in September of 1890 to explicitly permit horizontal and vertical third degree amendments in certain instances.[55] In this particular instance, the Senate established precedent that applied the 1874 rule (which had been renumbered from XII to XVIII

[54] Sept. 23, 1977, 95-1, Record, p. 30646.

[55] In September 1890, the Senate was considering an ANS to a bill relating to the federal Judiciary. It was original text for purposes of amendment under the 1874 rule. The precedent established here addresses the question of horizontal third degrees. During debate, George G. Vest (D-Missouri) offers a first degree substitute amendment to the ANS reported by Committee of the Whole (*A* on right side). Joseph N. Dolph (R-Oregon) then offers a first degree perfecting amendment to the ANS (*C* on right side). Senator John J. Ingalls (R-Kansas) then offers a second degree substitute amendment to the Dolph amendment (*D* on right side). Dolph then raises a p/o against the Ingalls amendment, arguing that it is in the third degree and not in order. Chair rules that under Rule XVIII, the Ingalls amendment is in the second degree and thus in order. Dolph appealed the ruling and Senator Eugene Hale (R-Maine) successfully moved to table the appeal on a 28 to 17 vote (39 senators were absent.) After disposition of Dolph's appeal, John C. Spooner (R-Wisconsin) inquired of the Chair if the Ingalls second degree substitute is amendable given that it is a motion to strike and insert. The Chair ruled that it was not because any amendment thereto would be an amendment in the third degree. Notably, the Chair does advise that further amendments to Dolph would be in order after disposition of the Ingalls amendment. See Sept. 22, 1890, 51-1, *Record*, pp. 10311-14.

by this point) to an ANS *and* a first degree substitute amendment pending to an ANS (branch *A*). In the case of *A*, the amendment could be further amended in one further degree. Additionally, the language of the ANS proposed to be stricken by *A* could be amended in two degrees (branches *C* and *D*). By applying the 1874 rule to *A*, the Senate effectively permitted more than two amendments to be pending at the same time. After this ruling, up to four amendments could be pending to an ANS at the same time.

The 1890 ruling also clarified that the left and right sides of the amendment tree in Chart 4 constituted separate trunks that could each support amendments in the second degree. This implied that *E* and *F* could be pending at the same time as *A*, *B*, *C*, and *D*. However, the number of amendments permitted on the left side of the tree was limited to two (a first degree perfecting amendment and a second degree substitute or perfecting amendment). The Chair advised in 1932 that a first degree substitute amendment was not in order on the left side of the tree because the ANS was pending and only one substitute could be pending to a measure at the same time.[56] Thus, while the ANS was treated as original text for the purposes of amendment on the right side of the tree, it continued to be treated as an amendment on the left side.

It should be noted that the lower half of Chart 4 was not visually depicted in the Senate's precedents until 1992. However, the Chair advised the Senate in 1967 that *G* or *D* in the lower half would be in order when a simple motion to strike was pending in branch *C*.[57] Additionally, the Senate considered an amendment offered in branch *G* in 1982.[58] I have not identified precedents for *G* and *D* pending at the same time or for *E*, *H*, and *F*, although these branches would be consistent with Chart 2 (see below). Finally, the precedent established in 1890 that a

[56] Feb. 15, 1932, 72-1, *Record*, p. 3938.
[57] Apr. 25, 1967, 90-1, *Record*, pp. 10692-94.
[58] May 13, 1982, 97-2, *Record*, p. 10032.

first degree motion to strike and insert would be treated in the same way as an ANS under the 1874 rule also provides the basis for Chart 3.[59]

Chart 1

As noted, the principles to which the 1874 rule change gave rise were technically only in effect when a motion to strike and insert was pending as an ANS or a first degree substitute. The rule and subsequent precedents did not speak to those parliamentary situations in which another motion was pending. In these instances, the Senate's original prohibition on horizontal and vertical third degree amendments appeared to be still in effect.

For example, the Senate defeated an attempt in 1914 to apply the 1874 rule and the 1890 precedent to parliamentary situations in which the first amendment offered was a motion to insert instead of an ANS (Chart 1 instead of Chart 4). In this particular case, the Senate was considering a committee amendment to insert language (branch *A*) into legislation dealing with tolling on the Panama Canal (HR 14385).[60] Senator Furnifold M. Simmons (D-North Carolina) offered a second degree substitute (branch *B*) to the committee amendment. Senator George Sutherland (R-Utah) then offered a competing second degree to perfect the text proposed to be stricken by the Simmons amendment (branch *C*). Senator Frank B. Brandegee (R-Connecticut) subsequently raised a p/o against the Sutherland amendment on the grounds that it violated the prohibition on horizontal third degree amendments. The Chair ultimately sustained the Brandegee p/o.

The debate over this question highlights the tension that arises from the amendment process's twin roles of facilitating deliberation and preserving order. Southerland argued that

[59] Jan. 7, 1915, 63-3, *Record*, p. 1096.
[60] June 10, 1914, 63-2, *Record*, pp. 10128-32.

Rule XVIII was not limited to those situations in which an ANS was the first amendment offered. Rather, the rule should be applied indiscriminately to any motion to strike and insert pending before the Senate. "The rule is that pending a motion to strike out and insert – not to strike out and insert in the original bill, but to strike out and insert as to any proposition which is pending before the Senate."[61] Under Sutherland's interpretation of the rule, the Simmons second degree substitute amendment (branch *B*) did not preclude senators from offering an additional second degree to perfect the text proposed to be stricken

In contrast, Henry Cabot Lodge (R-Massachusetts) claimed that Rule XVIII did not apply in this case and that the original prohibition on horizontal third degree amendments precluded more than two amendments from pending before the Senate at the same time because the first amendment was a motion to insert.

Lodge observed,

> The main question is the bill. The committee amendment is amendment No. 1. Any amendment to that amendment is in order and is No. 2, but any further amendment, whether substitute or perfecting, is amendment No. 3, and must be excluded at that stage.[62]

Lodge's allies feared that taking a broad construction of Rule XVIII (a la Sutherland) would effectively eliminate the limits on the number of amendments that could be pending before the Senate at any one time. The result would be chaos. The amendment process would become unintelligible, unwieldy, and confusing. Brandegee contended that the consequence of permitting Sutherland's amendment would be that every member would have

> …a right to offer an amendment to the amendment proposed by the Senator from Utah, and the Senator from New Hampshire can offer an amendment to my amendment to the amendment of the Senator from Utah, and we would spend the

[61] June 10, 1914, 63-2, *Record*, p. 10130.
[62] *Ibid*., 10129.

> rest of the year here offering amendments down the line to the other amendments.[63]

For these members, establishing such a precedent could jeopardize the Senate's ability to complete consideration of legislation in a timely process.

In sustaining Brandegee's p/o, the Chair advised, "Only one motion to amend the main question and one motion to amend that amendment can be pending at the same time."[64] This applied when the first amendment offered on the Senate floor was a motion to insert. The Chair acknowledged that a different parliamentary situation prevailed when the first amendment offered was an ANS, which was treated differently under the rule adopted in 1874. The Chair cited this as the "only exception" to his ruling.[65] Regardless, the Senate would eventually align its treatment of *B* in Chart 1 with *A* in Chart 4. By the 1930s, the Chair was advising across all Charts, "The philosophy of the rule seems to be to perfect whatever the Senate has to vote on before the Senate votes on it."[66]

Chart 2

During the debate in the 1914 case reviewed above, proponents of the Sutherland amendment argued that the Senate had, in fact, permitted horizontal third degrees in similar parliamentary situations in the past. Senator Joseph L. Bristow (R-Kansas) actually provided the Chair with a specific citation to one such case in the *Congressional Record* from that very year.[67] Yet Lodge correctly pointed out that the precedent in question concerned a motion to strike out

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[63] June 10, 1914, 63-2, *Record*, p. 10130.

[64] *Ibid*., p. 10131.

[65] *Ibid*., p. 10132. This advice appears to conflict with the precedent established in 1890 in which *A* in Chart 4 was given the same treatment as an ANS. However, it should be noted that the Senate was considering an ANS at the time and not, as in this instance, a motion to insert.

[66] Feb. 18, 1935, 74-1, *Record*, p. 2098. See also, Mar. 3, 1936, 74-2, *Record*, p. 3133; May 19, 1942, 77-2, *Record*, p. 4346.

[67] June 10, 1914, 63-2, *Record*, p. 10131.

text instead of a motion to insert new text, and thus represented a different amendment tree altogether (Chart 2 instead of Chart 1).

The amendment tree that arises when the first amendment offered on the Senate floor is a simple motion to strike is depicted in Chart 2. In the case cited by Bristow, the Senate was considering a committee amendment to strike text from an underlying naval appropriations bill.[68] Senator James A. O'Gorman (D-New York) moved to strike additional language in the underlying bill (branch *D* in Chart 2). Senator John Sharp Williams (D-Mississippi) then offered a second degree amendment (branch *E*) to the O'Gorman amendment. In response to a parliamentary inquiry, the Chair advised that the last clause of Rule XVIII which stated that "motions to amend the part to be stricken out shall have precedence" allowed for the Williams amendment to be pending despite the fact that there were already then two amendments pending. The Chair reasoned, "The Senator from Mississippi is seeking to amend the part to be stricken out before the motion is put on striking it out."[69]

However, Rule XVIII was adopted in the context of addressing a particular procedural situation that concerned a pending motion to strike out and insert and not a simple motion to strike. Additionally, it was clear during the 1874 debate that the Senate counted a motion to strike against the two-amendment cap established by the prohibition on horizontal third degrees (otherwise the Morton motion to strike in branch *E* would not have precluded an additional amendment under the prohibition on horizontal third degree amendments). Yet the Senate stopped counting such motions as amendments for purposes of enforcing the prohibition at some

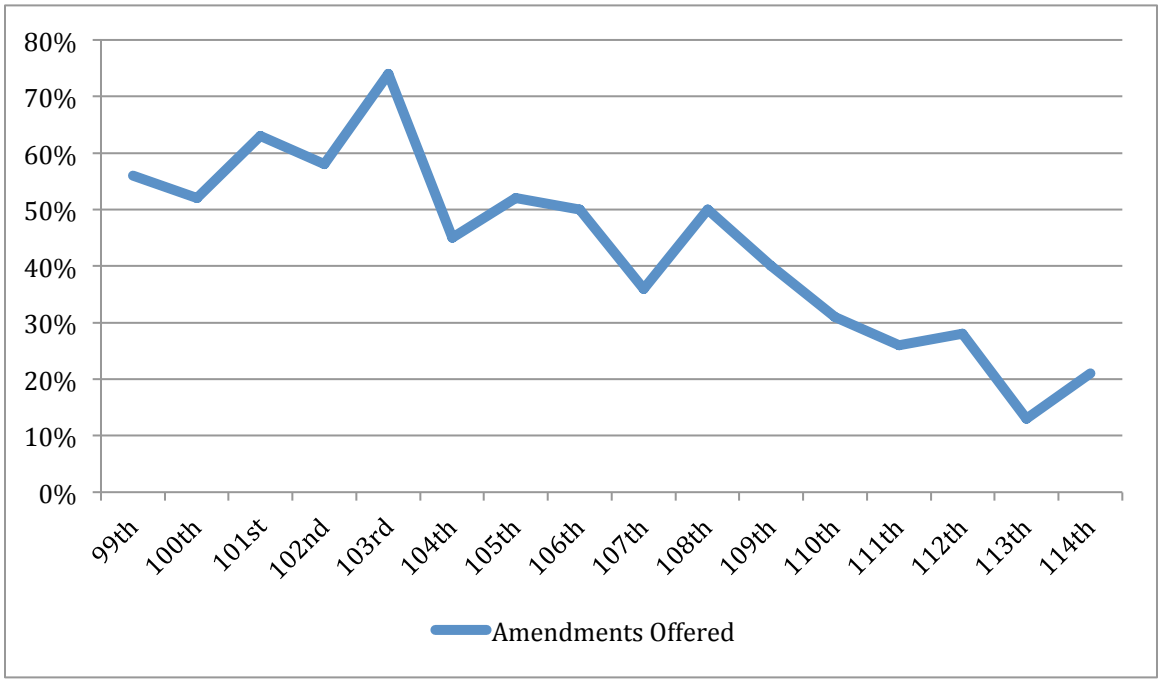
[68] See: May 29, 1914, 63-2, Record, pp. 9454-58.
[69] *Ibid*., p. 9456.

point in the late nineteenth or early twentieth centuries. What is clear is that by 1912, the motion to strike was no longer counted as an amendment for this purpose.[70]

Amendment Activity in the Contemporary Senate

The Senate has exhibited a general decline in amendment activity over the past three decades. While the number of amendments that are filed to legislation has remained relatively consistent, the number of amendments that are actually offered to bills on the Senate floor has declined considerably.

Figure 8: Amendments Offered (% of filed)



This trend is inconsistent with the historical development of the amendment process in that the latter was characterized by a gradual expansion in the number of amendments that could be pending before the Senate at the same time. The goal was to provide senators with more

[70] See: April 19, 1912, 62-2, *Record*, pp. 5018-21. See also, Jan. 8, 1915, 63-3, *Record*, p. 1161; Dec. 17, 1919, 66-2, *Record*, pp. 755-57; May 2, 1924, 68-1, *Record*, p. 3672; Mar. 24, 1938, 75-5, *Record*, p. 4005.

opportunities to amend legislation, not less. Significantly, the precedents underpinning this expansion have not changed. Rather, they are now being utilized for a different purpose. That is, they are no longer utilized to facilitate the orderly consideration of amendments on the Senate floor. Instead, they are used to prevent amendments from being made pending, thereby blocking votes on them altogether. As a consequence, the continued of the Senate's amendment trees in this capacity no longer reflects the principles of general parliamentary law according to which they were established. Instead, they now enable the majority leader to exert control unprecedented control over the legislative process in the contemporary Senate.

Precedents as a Source of Leader Power in the Amendment Process

Acknowledging this draws our focus to the ways in which the role performed by the amendment process for much of the Senate's history differs from its primary purpose today. A historical review of the precedents underpinning the process suggest that it was originally seen as a tool to discern the true sense of the Senate on a given question in the most orderly manner possible. In contrast, the most striking feature of the process today is its limiting nature. This suggests that the act of offering amendments no longer serves as a way in which the Senate can arrive at a greater understanding of what it thinks about a particular topic. Instead, the amendment process is typically viewed as the last hurdle needed to be surmounted before a preferred bill can be sent to the House or to the president's desk to be signed into law. To the extent that controversial amendments are permitted on legislation, they are either unopposed by the party leadership or their consideration is structured in such a way as to guarantee their defeat. This requires channeling all decisions regarding which amendments are allowed to be offered to legislation through a single veto point (i.e. the party leaders or bill managers). Once established,

such a veto point enables the leadership and/or bill managers to exercise disproportionate control over which amendments will be made pending to legislation on the Senate floor and to set the terms according to which those amendments will be disposed of.

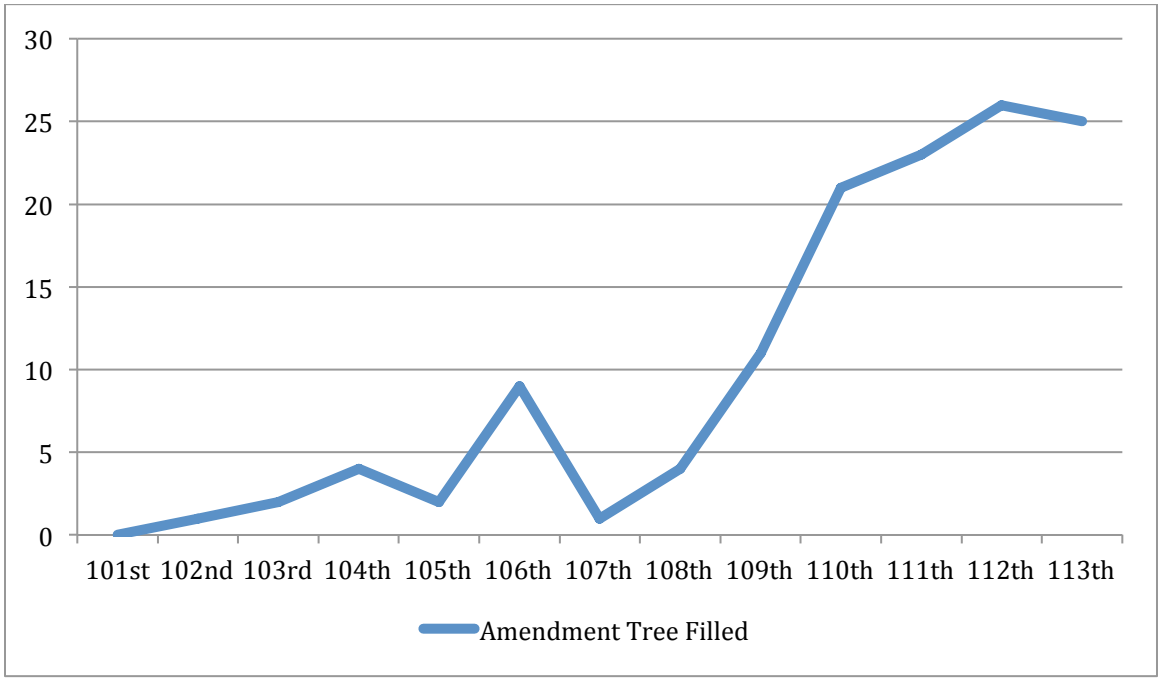
Establishing a veto point is accomplished by putting the Senate in a parliamentary situation in which unanimous consent is needed in order to get an amendment pending under one of the four amendment trees (see figures 4-7). The primary tool utilized by the majority leader to accomplish this is the tactic of filling the amendment tree. No amendments are in order once all the extant branches on the tree are occupied. At that point, the majority leader and/or bill manager is free to focus on negotiations with interested rank-and-file colleagues to reach a unanimous consent agreement that provides for several amendments and a vote on final passage without having to worry about a member jeopardizing the legislation's prospects by offering a controversial or otherwise unwanted amendment without permission.

Additionally, the majority leader (or bill manager) may offer a "blocker" amendment to establish the veto point. For example, an amendment offered to branch *C* in Chart 4 would serve as a blocker amendment if offered first and in the form of a motion to insert (or strike and insert). Once pending, any other amendment offered directly to the ANS would require consent to get pending (which would presumably be denied if the majority leader/bill manager wanted to block the amendment). This tactic is less aggressive than completely filling the amendment tree in that it typically leaves a few branches open for possible amendment. However, these branches are rarely connected directly to the ANS. For example, in the Chart 4 hypothetical example, the blocker amendment leaves branches *E* and *F* (on the left side of the amendment tree) open. Branch *D* (second degree to *C* on the right side) is also left open. These branches do not present the same challenges to proponents of the bill because their impact would be minimal if the

amendments pending their prevailed. The majority leader could move to table *C* in order to prevent a vote on *D* on the right side of the tree. Additionally, adoption of *E* and *F* on the left side of the tree would be negated once the Senate adopts the ANS.

The instances in which the majority leader has filled the amendment tree have increased significantly in recent congresses (see figure 9). This is consistent with the decline in amendment activity more generally.

Figure 9: Filling the Amendment Tree



Reasons the majority leader resorts to filling the amendment tree include: to prevent unwanted amendments from receiving votes on the Senate floor; to expedite floor consideration; to increase the leadership's leverage in negotiations over unanimous consent agreements; to secure the first recorded vote on legislation prior to the possibility of it being amended; and to exert leadership control over the nature and timing of floor consideration.

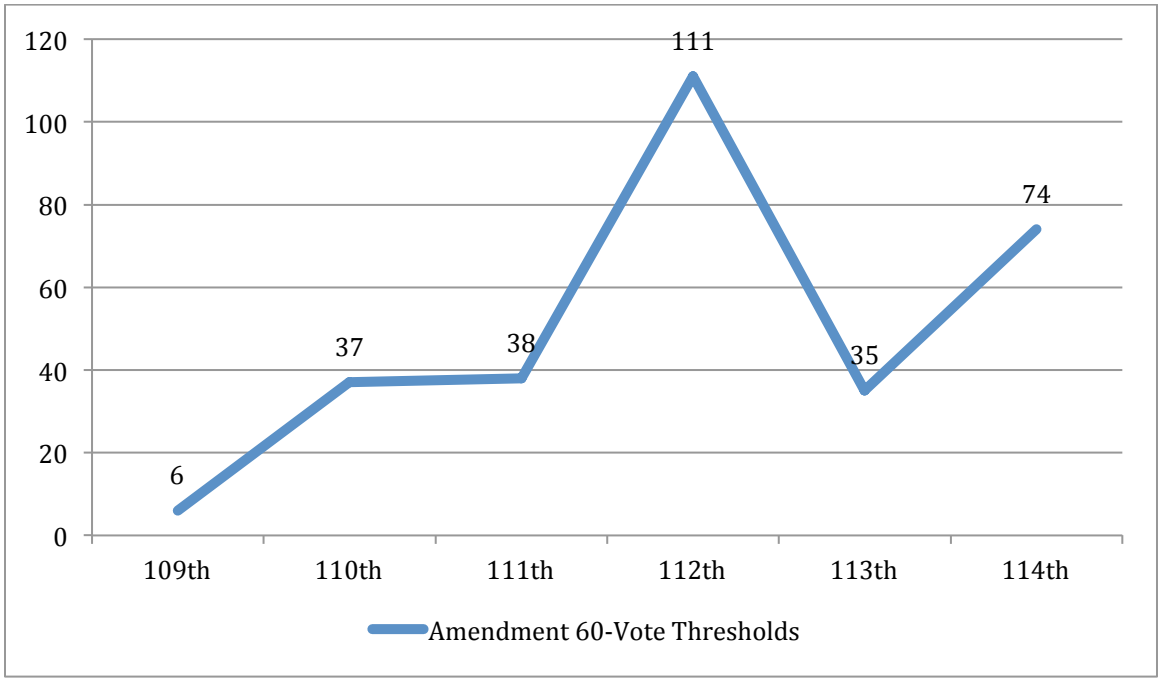
Yet filling the amendment tree does have limitations. The tactic cannot be used to pass legislation on the Senate floor unless the majority leader has the sixty votes necessary to invoke

cloture on the underlying legislation over the objections of the minority. Additionally, the very act of filling the amendment tree itself may alienate minority party members, thus further reducing the likelihood that sixty votes can be found to end debate. Nevertheless, unified minority opposition is difficult to sustain. The majority leader often isolates and negotiates directly with select members of the minority party who are predisposed to support the underlying legislation in order to build a sufficient coalition. Former Senate Parliamentarian Robert Dove observes that the practice of filling the amendment tree "has been used repeatedly in conjunction with cloture votes to, in effect, put the minority party in the position of either voting for cloture, in which case they have lost their right to amend, or voting against it" (Dove 2010). This can represent a difficult choice for many members depending on the nature of the legislation under consideration. Voting against cloture on legislation popular with their constituents because they were blocked from offering an amendment on something else could be a difficult position to sustain for electorally vulnerable senators.

Once the Senate is in a parliamentary situation in which unanimous consent is needed to get an amendment pending to legislation on the floor, the majority leader can use his increased leverage to secure a higher vote threshold for adoption of an amendment. The majority's desire to limit the minority's ability to attach what it considers poison pill amendments to legislation it supports on the Senate floor is thus reflected in the dramatic increase in the use of unanimous consent agreements to set sixty-vote thresholds for passing amendments (see figure 10). The majority leader uses the threat of not allowing particular amendments to get pending in order to compel individual senators to agree to the higher vote threshold on their amendment, even though doing so means that the amendment will most likely be defeated.[71]

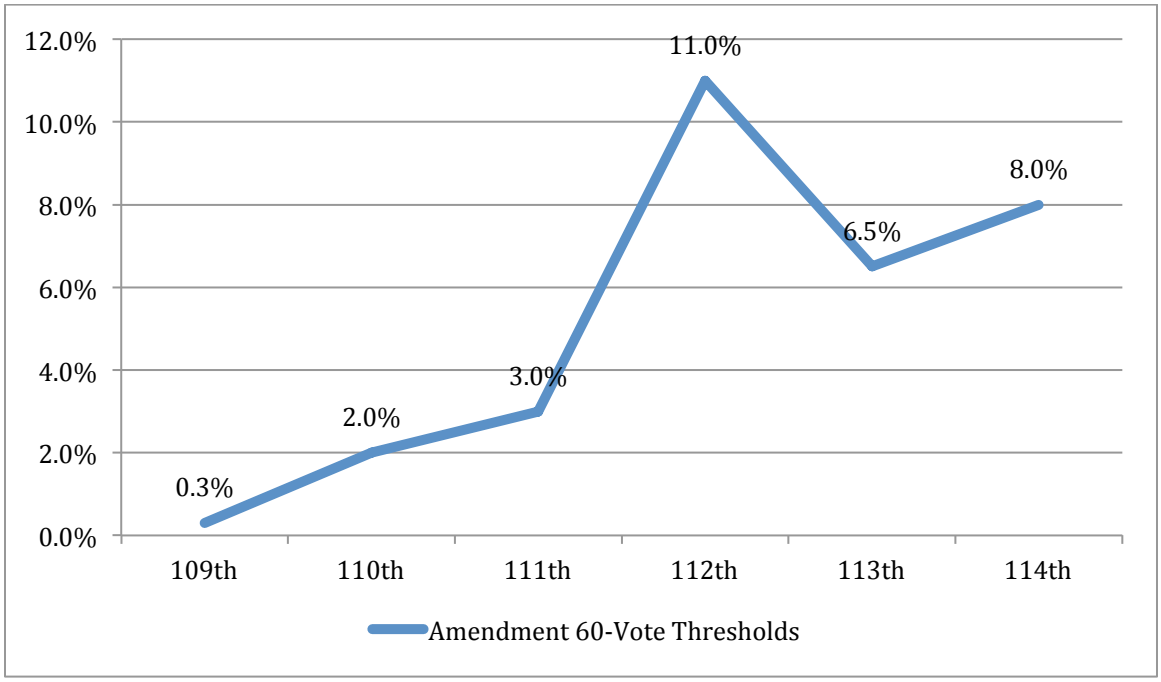
[71] See Smith (2014, 221-227) and Beth, et al. (2009) for examples of the few treatments of 60-vote thresholds for amendments in the existing literature.

Figure 10: Amendment 60-Vote Thresholds



The earliest documented use of such a consent agreement occurred in the 102nd Congress. However, this was a relatively rare procedural tool until the 109th and 110th Congresses, when majority leaders Senators Bill Frist (R-Tennessee) and Harry Reid (D-Nevada) began utilizing them on an increasing scale. In the 109th Congress, consent agreements were used in this manner in six instances. However, in the 110th Congress, their use increased significantly, totaling thirty-seven instances. The use of this tactic remained relatively level in the 111th Congress at thirty-eight. In the 112th Congress, sixty-vote thresholds were set for amendments on a staggering 111 occasions. The tactic was utilized thirty-five times in the 113th Congress. The trend in the tactic's use is more easily discerned when depicted as the percentage of the total number of amendments offered in a particular Congress (see figure 11).

Figure 11: Amendment 60-Vote Thresholds (% of all amendments offered)

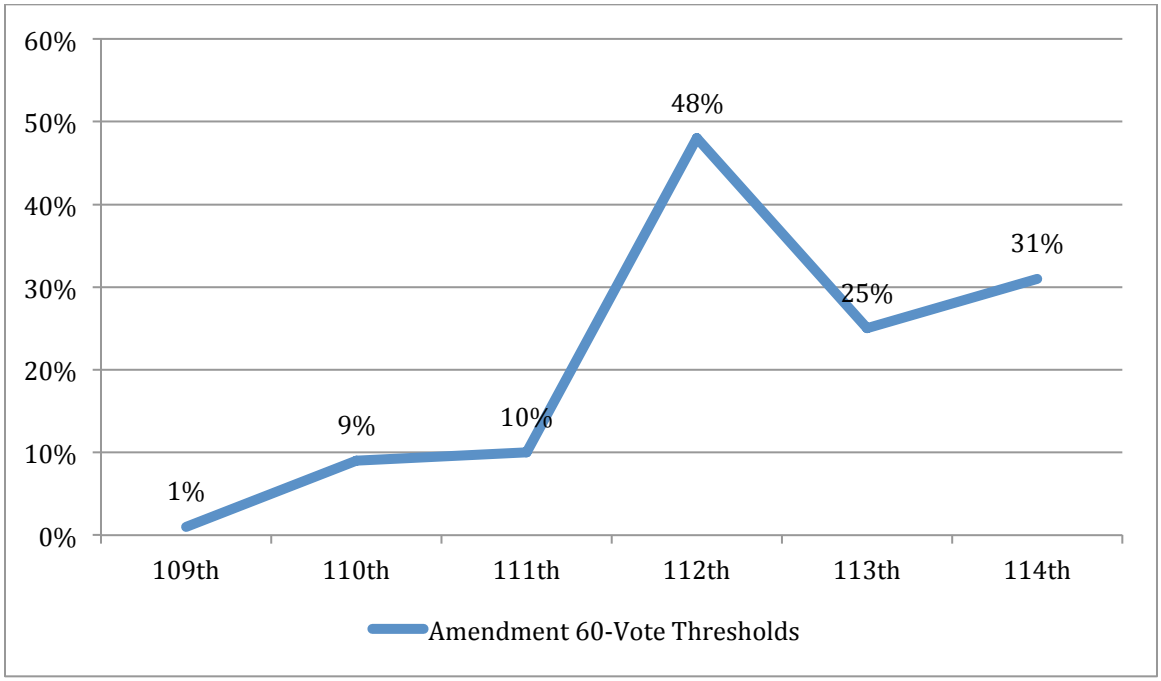


The decline in amendments subject to a sixty-vote threshold from the 112th to 113th Congress is not as abrupt when viewed as a percentage of all amendments offered. This is because only 542 amendments were offered to legislation on the Senate floor during the 113th Congress (compared to 974 in the 112th Congress).

Pursuant to such agreements, the amendment is withdrawn if it does not get the requisite number of votes. The practice allows an amendment's supporters to demonstrate support for cloture without going through the time-consuming process of invoking it. However, they are seldom successful. In the 109th And 110th congresses, amendments considered in this manner failed 100 percent and 78 percent of the time, respectively. In the 111th and 112th congresses, the percentage of amendments considered in this manner that failed was 61 percent and 87 percent respectively. Most recently, 77 percent of the amendment considered pursuant to this tactic failed in the 113th Congress. As a result, their use can be interpreted as allowing the majority to facilitate the passage of legislation by allowing the minority to offer amendments without risking

the adoption of a poison pill. This process does not present a problem for majority party members because they typically oppose the amendment in question, and a sixty-vote threshold means that it is unlikely to pass. In addition, members of the majority are more likely to have their priorities included in the underlying bill before it reaches the Senate floor for consideration. Minority party members often support this process begrudgingly because it provides an opportunity to offer the amendment in question and get a vote on it, all without having to expend the necessary resources to actually filibuster the underlying legislation. In addition, they may not get the opportunity to offer the amendment altogether if they reject the 60-vote threshold.

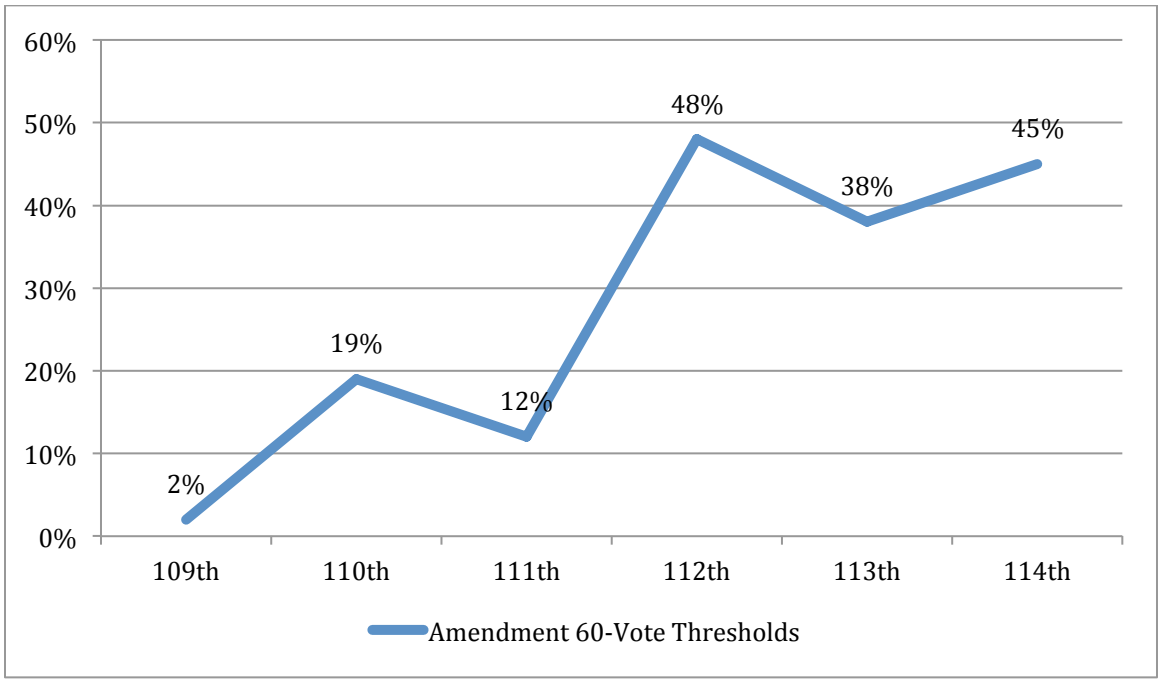
Figure 12: Amendment 60-Vote Thresholds (% of all amendment RCVs)



The practice of forcing 60-vote thresholds for the adoption of controversial amendments is increasingly central to the majority leader's management of the Senate. The share of Roll Call Votes (RCVs) on amendments set at sixty by consent has increased considerably over the last three congresses (See Figure 12). The increased utilization of the 60-vote threshold is particularly striking when RCVs on amendments to the budget resolution and reconciliation bills

are omitted. Omitting budget and reconciliation amendments yields a more accurate portrayal of the tactic's centrality to decision-making in the Senate because a member cannot be blocked from offered such amendments (see figure 13).

Figure 13: Amendment 60-Vote Thresholds (% of non-budget amendment RCVs)



Minority Protest Tactics

While Senate majorities have exercised increasing agenda control over the Senate in recent years, it would be inaccurate to view Senate minorities as powerless. Individual senators, and the minority party collectively, can utilize the Senate's rules and practices to circumvent the majority leader's efforts to control the agenda by blocking votes on amendments. Specifically, the minority has availed itself of three procedural tactics: suspending the rules, moving to table the amendment tree, and offering third degree amendments.

First, an earlier interpretation of the rules by the Senate parliamentarian significantly undermined the majority leader's ability to block votes in relation to minority amendments by

filling the amendment tree. Specifically, the parliamentarian advised that motions to suspend the rules in order to offer a non-germane amendment, or motion to (re)commit after cloture has been invoked are permitted pursuant to Rule V of the standing rules of the Senate.[72] The majority leader's decision to fill the amendment tree more frequently in the 112th Congress led Republican senators, as well as some Democrats, to utilize this parliamentary maneuver more often.

Despite the fact that utilizing motions to suspend in this manner undermined the majority's control of the agenda, the majority did not act to restrict this tactic with the creation of a new precedent for over a year. Reid eventually utilized a majoritarian maneuver in October 2011 that was nearly identical to the mechanics of the nuclear option when he overturned the precedent created by the Senate's adherence to the parliamentarian's earlier advice.[73] Specifically, Reid made a motion to suspend the rules and raised a point of order against his own motion that it was dilatory post-cloture. The Chair ruled that the motion to suspend the rules was in order pursuant to the Senate's precedents. Despite the fact that Reid's point of order was not applicable to the current situation and was thus inconsistent with the Senate's precedents as interpreted by the parliamentarian and confirmed by the Senate in previous actions, a majority of the Senate voted to overturn the ruling of the Chair on a party-line vote. This vote effectively established a new precedent that motions to suspend the rules to offer non-germane amendments were not in order during post-cloture consideration of a bill.

[72] A motion to suspend any rule of the Senate is only in order one day after notice has been given in writing. Motions to suspend require a two-thirds vote of those present and voting (typically sixty-seven senators if all members are present and voting) for passage, as opposed to the three-fifths vote (typically sixty) required to invoke cloture, and the simple-majority requirement to pass a measure on an up-or-down vote (Riddick and Frumin 1992, 1271).

[73] The precedent created on October 2011 overturned a previous precedent and did not impact the Standing Rules of the Senate. The nuclear option refers to the use of precedent to ignore, circumvent, or change the Standing Rules of the Senate with a simple-majority vote in direct violation of those rules. The Chair's ruling was reversed by a vote of fifty-one to forty-eight. Barbara Boxer (D-California) was necessarily absent and did not vote. Ben Nelson (D-Nebraska) was the only Democrat to vote to sustain the Chair's original ruling (i.e. to vote against Reid).

Second, Republican senators began using a new procedural tactic to protest the majority leader's continued filling the tree in late 2013. Specifically, a senator would move to table one of the perfunctory amendments used by the majority leader to fill the amendment tree with the stated purpose of offering another, substantive, amendment. Any senator can make the motion to table and doing so triggers an immediate vote at a simple-majority threshold (i.e. it is non-debatable; it cannot be filibustered). If the motion is successful, the pending question is defeated and, in this case, any member can then offer an amendment to the underlying legislation at the spot on the amendment tree previously occupied by the majority leader's blocker amendment. This tactic is permitted under the Senate's rules and precedents and represents a guaranteed way to force a recorded vote.

Republicans employed the tactic ten times in the 113th Congress. It was first used in protest of the nuclear option at the end of 2013. The Democrats easily defeated all but the last attempt to table the tree. On September 18, 2014, Ted Cruz (R-Texas) moved to table the blocker amendment on the tree. His effort failed on a fifty-fifty tie vote. Five Democrats voted with all of the Republicans for the Cruz motion.[74]

Nevertheless, the tactic does not pose significant threats to the majority leader's ability to control the amendment process. First, the recorded vote associated with this tactic is on a procedural motion in relation to a different amendment (i.e. the blocker amendment offered by the majority leader to fill the amendment tree). The minority attempts to link the vote on the motion to table to a different issue by speaking before moving to table. For example, Jeff

[74] Sept. 18, 2014, 113-2, *Record*, p. S5764. Cruz moved to table the tree for the stated purpose of offering an amendment to bar the use of federal funds to issue new work authorizations to illegal aliens or to allow those in the country illegally to remain in the United States under President Barack Obama's Deferred Action for Childhood Arrivals program. The underlying bill was the fiscal year 2015 continuing resolution (H.J. Res. 124).

Sessions (R-Alabama) linked his motion to table the tree in December 17, 2013 with the subject matter of the amendment he was being blocked from offering.

> Again, summarizing for my colleagues, the Presiding Officer is telling this Senate that if there can be 51 votes to table the current amendment tree to the House-passed spending bill, then there will be an opportunity for me or other senators to offer by motion a motion to concur with the amendment that strikes the military pay cut. So, Madam President, in order to make a motion to concur with amendment No. 2572, I move to table the pending motion to concur with an amendment offered by the majority leader, and I ask for the yeas and nays.[75]

Characterizing a motion to table a specific amendment pending to legislation on the floor as a substantive vote on a separate amendment is difficult. This is because it requires linking the vote with a statement made by a member in the *Congressional Record*.

The costs of losing a vote on a motion to table the amendment tree are not prohibitive for the majority. Should the minority successfully table the tree, the majority leader can simply get recognized immediately after the vote to offer another blocker amendment in the newly vacant branch on the amendment tree. This is because the tactic requires two steps to be successful. First, a senator must table the blocker amendment in the tree. If successful, the senator must then get recognized again to offer an amendment to the newly vacant branch on the tree. However, the majority' leader's priority of recognition makes it unlikely that a senator can get recognized in this scenario. Additionally, a successful motion to table does not create a new precedent that would limit the ability of the majority leader to restrict the minority's rights in the future.

Finally, a senator may attempt to circumvent the majority leader's ability to prevent amendments by offering a so-called third degree amendment despite a filled tree and then appeal the subsequent ruling of the Chair that the amendment is not in order to force a recorded vote and/or the majority to filibuster the appeal. This as the tactic employed by Cruz in July 2015 to circumvent Majority Leader McConnell's attempts to prevent a vote on his amendment. As the

[75] Dec. 17, 2013, 113-1, *Record*, p. S8897. The motion failed by a vote of forty-six to fifty-four.

comments from Alexander and Cornyn on the Senate floor indicated at the time, the leadership was particularly worried about third degree amendments.

As previously noted, the process of filling the amendment tree follows precedent to block members from offering their own amendments. However, any senator may attempt to offer an amendment even though the amendment tree has been filled. In this situation, the Chair would rule that the amendment is not in order pursuant to the Senate's precedents. At that point, the member could appeal the ruling of the Chair and request a recorded vote.[76]

Offering a third degree amendment has a number of advantages for individual senators and the minority party. First, it is permitted under the Senate's current rules (not precedents, although it is consistent with the principles on which they are based and were designed to facilitate for much of the Senate's history). For example, Rule XX stipulates, "A question of order may be raised at any stage of the proceedings…and, unless submitted to the Senate, shall be decided by the Presiding Officer without debate, subject to an appeal to the Senate."[77] Second, it reinforces the minority's narrative that the majority is unwilling to vote on their amendments and therefore blocks them. Third, offering amendments despite the filled tree and appealing the ruling of the Chair that they are not in order forces the majority to cast tough votes on procedural questions directly related to the amendment being offered. Procedural votes have been viewed as substantive votes when the question is directly related to the underlying policy and the tactic is utilized on a regular basis. For example, cloture has evolved from being widely perceived as a procedural vote to the point that it is viewed by nearly everyone as a substantive vote today (Sinclair 2006, 150, 164). Votes on third degree amendments could thus be more easily

[76] According to the Senate's precedents, "Decisions of the Chair are subject to appeal and by a majority vote the Senate may reverse or overrule any decision by the Chair" (Riddick and Frumin 1992, 146).

[77] "Rule XX: Questions of Order," *Standing Rules of the Senate* (Washington: Government Printing Office, 2007), 15.

characterized as substantive votes than a motion to table a blocker amendment in the amendment tree.

Recent developments in the Senate support this claim. For example, Senator Pat Toomey (R-Pennsylvania) offered a third degree amendment to legislation extending emergency unemployment benefits (S. 1845) on January 15, 2014. The tree had been filled and, as a result, members were not allowed to offer amendments on the Senate floor. Kelly Ayotte (R-New Hampshire) had previously moved to table the blocker amendment in the amendment tree so that senators could then offer their own proposals to the legislation. However, the Democrats easily defeated Ayotte's effort on a forty-two to fifty-four vote. Toomey then subsequently ignored the blocker amendment and offered an amendment directly to the legislation instead of moving to table the tree. His amendment would have prohibited people with annual incomes greater than $1 million from receiving unemployment benefits. In contrast to how it handled the Ayotte motion to table, the majority pulled the legislation from the Senate floor before adjudicating the Toomey appeal of the Chair's ruling that his amendment was not in order under the Senate's precedents. Despite their previous unwillingness to allow a vote on the amendment, the majority ultimately included the text of the amendment in the Emergency Unemployment Compensation Act of 2014 (HR 3979), which eventually passed the Senate in April 2014.

Similarly, Senator David Vitter (R-Louisiana) offered an amendment during the consideration of HR 3979 even though the majority leader had filled the tree in an effort to block amendments. While Vitter's appeal of the Chair's ruling that the amendment was not in order was tabled sixty-seven to twenty-nine, the vote illustrated the tactic's utility in imposing costs on rank-and-file senators when used in conjunction with efforts by outside advocacy groups to publicize it. That these procedural votes may be characterized as substantive votes if utilized on a

regular basis was demonstrated after the vote when several conservative advocacy groups sent Vitter a letter thanking him for utilizing the tactic. In the letter, these groups asserted that offering third degree amendments "put senators on record for their willingness to allow legislative deliberation in the Senate." Significantly, the letter stated that of the organization signatories, those with scorecards "intend to treat these procedural votes as policy votes" moving forward.[78]

Threatening to ignore a filled amendment tree by simply offering an amendment and appealing the ruling the Chair that it is not in order may thus encourage the majority leader to return to an open process by giving senators leverage with which to negotiate for amendment opportunities on legislation in the future (or deter other behavior).

Conclusion

This paper has examined the role played by precedent in enabling the majority leader to exercise centralized control over the Senate's amendment process. Specifically, it detailed the relationship between the Senate's Standing Rules and precedents in governing the amendment process. An analysis of the historical construction of that process underscores the particular importance of the role played by informal precedents in its development. With the exception of the Standing Rule adopted in 1874, precedents have been largely responsible for providing structure and coherence to amending activity on the Senate floor in the years since. Given the ambiguous language of the 1874 rule and the specific context in which it was adopted, these precedents were critical in distinguishing those situations after 1874 in which it should be applied.

[78] Letter to Senator David Vitter. April 10, 2014. The leaders of several advocacy groups signed the letter, including: American Conservative Union, Americans for Prosperity, Concerned Women for America, Family Research Council, and Heritage Action for America.

The precedents stipulating how many amendments may be pending to legislation at a given time evolved in order to facilitate the consideration of the Senate's business in an orderly manner. However, juxtaposing the historical construction of the amendment process with the general state of amending activity in the Senate today point to the ways in which the precedents underpinning it are being used for a different purpose. That is, they are now being utilized by majority leaders from both political parties to block the consideration of amendments on the Senate floor. Yet as in the past, the amendment trees can be altered in order to facilitate the ability of members to offer amendments while maintaining order in the institution. Individual senators, and the minority party more generally, can challenge the majority leader's ability to use precedent in order to block their amendments by offering either horizontal or vertical third degree amendments when the tree has been filled. The fact that they have not done so is puzzling.

The concept of path dependence may help explain why senators have not consistently utilized the tactic of offering third degree amendments. Path Dependence is understood here as describing a process that is resistant to change because the costs of doing so are high compared to maintaining the status quo. In addition, the costs of changing course increase over time (Pierson 2000, 252). Institutional rules are path dependent (Aldrich 1994). Yet path dependence may impact the Senate in a way that differs from how we typically think about the path dependent nature of the institution's rules. That is, that they affect the legislative process by constraining the majority party in pursuit of its goals and enhancing the ability of the minority to obstruct. Instead, the contemporary utilization of the precedents underpinning the amendment process provides an example of one way in which the path dependent nature of the Senate's rules may help increase the ability of the majority to exercise negative agenda control.

From this perspective, we can posit that members altered the trees in the past when the costs they imposed exceeded the costs of change. By extension, the costs of the status quo today simply are not perceived as high relative to the perceived costs associated with adjudicating the amendment trees by offering third degree amendments. Unlike in the past, the amendment trees are now seen as playing an important role in the Senate. This perception could stem from the increased polarization inside and outside of the Senate and the importance both parties place on the ability to filibuster when in the minority. Given that the practice of blocking amendments is particularly offensive to members of the minority, we would expect the minority to weigh carefully the impact of anything it does in retaliation on the cloture rule. However, the successful use of the nuclear option in November 2013 coupled with the widespread belief on both sides of the aisle that the majority of either party will nuke the legislative filibuster the moment it is politically advantageous to do so undermines, and the continued frustration with the state of the amendment process weaken this claim.

Acknowledging the role played by path dependent arguments in deterring third degree amendments allows us to grasp two important ways in which such arguments represent a redefinition of the role played by precedent in structuring the Senate's amendment process. First, Alexander equated appealing the ruling of the Chair to adjudicate the amendment tree with the nuclear option. Yet the previous examination suggests that there are significant differences between the two procedural maneuvers, even though they may utilize the same mechanism (i.e. an appeal). Appealing the ruling of the Chair that an amendment is not in order when the amendment tree has been filled is not synonymous with the nuclear option because it does not violate the Standing Rules of the Senate. Appealing the ruling of the Chair for the purposes of offering a third degree amendment despite the amendment tree being full would, if successful,

create a new precedent governing the amendment process. It would not, however, violate any specific rule. Creating a new precedent by appealing the ruling of the Chair would only be functionally equivalent with the nuclear option if the new precedent explicitly violated an existing provision of the Standing Rules. Otherwise, the creation of a new precedent on appeal is entirely consistent with Senate rules and past practices.

Second, Alexander claimed that Cruz's appeal, if successful, would destroy regular order in the Senate. Yet a closer examination of the regular order regarding the amendment process suggests that it would remain relatively unaffected by a successful appeal. His central point is that the modern amendment trees enable the Senate to function. The implication here is that the consideration of legislation on the Senate floor would be chaotic if the current amendment trees were altered by successfully appealing the ruling of the Chair that an amendment is not in order when the amendment tree has been filled. Specifically, creating a new precedent that a so-called third degree amendment is in order would lead to chaos as there would be nothing to stop a fourth, fifth, sixth, seventh…. or thirtieth degree amendment from being offered. Effectively removing the limits on the number of amendments that can be pending to legislation on the Senate floor would thus make it impossible to process bills in an orderly manner according to this argument.

Yet as noted previously, horizontal third degree amendments refer broadly to first and second degree amendments that are not in order under the Senate's precedents when the amendment tree has been filled. For example, the Toomey and Vitter third degree amendments offered to the unemployment insurance extension bill in the last several months were first degree amendments. Had the appeals been successful, they would have simply created another branch

on the amendment tree in question that more than one first degree amendment could be pending at the same time consistent with the precedents established in previous years.

In reality, the only time the amendment trees are adhered to literally in the contemporary Senate is when the majority leader would like to block other senators from offering amendments. Instead of processing amendments by following the amendment trees, the "regular order," or practice most commonly followed, is to process amendments by unanimous consent (e.g. "I ask unanimous consent to set aside the pending amendment and call up Amdt. #1234). Thus, limiting the majority leader's ability to fill the amendment tree would simply force the Senate to return to the way in which it routinely processed amendments prior to the dramatic abuse of the amendment tree. Moreover, when individual senators are refused unanimous consent to set aside the pending amendment to offer another amendment, they are typically discouraged from calling for regular order and offering a second degree amendment to an amendment already pending, even though doing so is entirely permissible under current precedents.

Indeed, the Senate has considered legislation for most of its history without utilizing the contemporary practice of routinely filling the amendment tree for the explicit purpose of blocking individual senators from offering their own amendments. While preventing the majority leader from being able to routinely fill the tree may make it more difficult for the Senate to block votes on amendments altogether, the Standing Rules and the institution's precedents contain several tools that can be used to facilitate the orderly consideration of amendments on the Senate floor. These include (but are not limited to) the requirement that committee amendments to reported legislation be considered prior to the consideration of amendments from the floor,

precedents prohibiting language previously amended from being amended again, and the filing deadlines associated with Rule XXII.[79]

Whether or not senators ultimately adopt such a redefinition of the relationship between the Standing Rules and precedent moving forward could have significant consequences for the future course of the Senate's institutional development. The arguments advanced by Senators Alexander and Cruz suggest two very different directions for the future course of the Senate's development. On one hand, equating precedents that "fill in the gaps" where the rules are silent with the Standing Rules (i.e. effectively requiring a two-thirds vote to alter precedent) would effectively bind the Senate to how it operated in the past regardless of the development of new circumstances, the manner in which the original precedent was established (i.e. unchallenged ruling of the Chair or a series of parliamentary inquiries combined with unchallenged Senate action in specific situations), or the merits of the original precedent and whether or not it violated the Standing Rules in the first place. This would further increase the majority leader's control over Senate decision-making by delegitimizing the efforts of individual members to adjudicate precedent or to protest what they perceived to be unfair or inaccurate rulings of the Chair.

On the other hand, third degree amendments could eventually undermine the majority leader's ability to control the amendment process. Challenging the ability to fill the amendment tree with a third degree amendment thus has the potential to impose significant costs on the majority leader directly. If used on a routine basis, this tactic could weaken, or even end, the majority's ability to exercise negative agenda control in the future. As such, third degree amendments could substantially alter the balance-of-power between the majority and minority parties in the institution, as well as between individual senators and the party leadership. Had the

[79] Note: This list is by no means meant to be exhaustive. There are numerous tools available to the Majority Leader (and individual senators) to facilitate the orderly consideration of amendments on the Senate floor.

Cruz, Toomey, or Vitter appeals been successful, they would have created another branch on the amendment tree and their amendments would have then been pending to the legislation without any subsequent action required on their part. At that point, the Senate would have to dispose of the amendments, which effectively guarantees a recorded vote on them. Instituting a new norm that a filled amendment tree need not be followed in this manner would gradually undermine the ability of the majority leader to block amendments in the first place. In practice, the only time the amendment tree is followed literally in the contemporary Senate is when the majority leader would like to block other senators from offering amendments. Without this ability, it would be very difficult for the majority leader to block senators from offering amendments. As a consequence, the majority leader's ability to protect his members from voting on amendments, poison pill or otherwise, would be compromised.

The preceding analysis also suggests several avenues for future research. First, the inquiry started here needs to be expanded to include a systematic analysis of the Senate's amending data. Second, more attention needs to be given to identifying the various factors driving the Senate to expand the number of amendments allowed to be pending at the same time at certain points in its history. Finally, the analysis needs to be more fully incorporated into the existing literature on the Congress.

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